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No. 15150

United States
Court of Appeals
for the Ninth Circuit

GLENN WEIBLE and PATRICIA WEIBLE,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

AUG 23 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

Civil Number 15717-T

GLENN WEIBLE and PATRICIA WEIBLE,
Plaintiffs,

vs.

UNITED STATES,
Defendant.

COMPLAINT, REFUND OF TAXES

For a First Cause of Action, Plaintiff, Glenn
Weible, Alleges:

1. Jurisdiction is conferred on the Court by Title 28, United States Code, Sections 1340 and 1346; the total amount of the claims of plaintiffs, Glenn and Patricia Weible, do not exceed Ten Thousand Dollars (\$10,000.00); the action arises under the Internal Revenue Code, more particularly Sections 322 and 3772 thereof.

2. On or about March 15, 1948, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California a Federal Individual Income Tax Return for the taxable year ended December 31, 1947, and concurrently therewith paid to the Collector of Internal Revenue the amount of \$1,320.13 in Federal Individual Income Taxes for that year.

3. Claim for Refund was filed with the Collector of [2*] Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of \$696.13 on the ground that plaintiffs' Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "A" and by reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiff by registered mail, dated March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiff based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff at all times mentioned herein was a citizen of the United States;

(b) In September, 1945, plaintiff was employed by Max Factor and Co., a domestic corporation, as its representative to train personnel in foreign branches of said employer, and to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for said employer. Plaintiff entered into an employment contract with said employer, wherein he agreed to remain permanently outside of the United States in the performance of his duties, except for occasional short periods of training and consultation.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

(c) In June, 1946, after a period of training, plaintiff was sent by his employer pursuant to his contract of employment to Australia for the purpose of establishing a manufacturing plant in that country for his employer. No definite period of time was established by either plaintiff or his employer for the completion of plaintiff's assignment in Australia, but on the contrary, plaintiff agreed to remain in that country for an indefinite period of time and until such assignment was [3] completed. Plaintiff's assignment in Australia was of such a nature that an extended stay in Australia was necessary for its accomplishment. Plaintiff resided in Australia from June, 1946, until October, 1948, with the intent to reside in Australia for an indefinite period of time and until said assignment was completed. Plaintiff was a bona fide resident of Australia during the entire year 1947.

(d) The amount of Six Hundred Ninety-six and 13/100 Dollars (\$696.13) for which plaintiff claims refund is the amount of Federal Income Tax attributable to that part of plaintiff's income in the year 1947 which consisted in its entirety of salary paid to plaintiff Glenn Weible by said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Australia.

6. The denial of plaintiff's Claim for Refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiff was and is entitled to have a refund of said amount paid with interest thereon.

7. Plaintiff's said claim for refund has not been satisfied in whole or in part and the total amount mentioned above is now due and owing from defendant.

For a Second Cause of Action, Plaintiffs Glenn and Patricia Weible Allege:

1. Paragraph 1 of the First Cause of Action of plaintiff Glenn Weible is hereby incorporated by reference as though fully set forth herein.

2. On or about March 15, 1949, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Federal Individual Income Tax Return for the taxable year ended [4] December 31, 1948, and concurrently therewith paid to the Collector of Internal Revenue the amount of Nine Hundred Eighty-three and 96/100 Dollars (\$983.96).

3. Claim for refund was filed with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of \$983.96 on the ground that plaintiffs' Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "B" and by reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiff by registered mail dated

March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiff based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff Glenn Weible was at all times herein mentioned a citizen of the United States; plaintiff Patricia Weible at all times herein mentioned was a citizen of Australia.

(b) Plaintiffs were married in 1948 in Australia and have been married since that time.

(c) Plaintiffs refer to paragraph 5(b) of the First Cause of Action of plaintiff Glenn Weible and by reference incorporates it herein.

(d) From June, 1946, until October, 1948, plaintiff Glenn Weible, pursuant to said employment contract, was employed in Australia for the purpose of establishing a manufacturing plant in that country for his employer. No definite period of time was established by either plaintiff or his employer for the completion of said assignment, but, on the contrary, plaintiff agreed to remain in that country for an indefinite period of time and until [5] said assignment was completed. The nature of his assignment in Australia was such that an extended stay was necessary for its completion. At the time plaintiff Glenn Weible commenced his assignment in Australia he agreed with his employer that upon the completion of such assignment he would be transferred on a similar assignment to some country

other than the United States and that such similar assignment would be for an indefinite period and of such a nature that an extended period of time would be required for its completion.

During the period June, 1946, to October 15, 1948, plaintiffs resided in Australia with the intent to remain there indefinitely, and during such period plaintiffs were bona fide residents of Australia.

(e) On October 15, 1948, plaintiff Glenn Weible was instructed by his employer to return to the United States for a retraining period preparatory to his assignment to Canada for the purpose of establishing a manufacturing plant for his employer in Canada. Plaintiff Glenn Weible agreed to accept said assignment and to remain in Canada for an indefinite period of time until the completion of said assignment. The nature of said assignment in Canada was such that an extended stay in Canada was necessary for its accomplishment. From October 15th to October 29th, plaintiffs remained in the United States while plaintiff Glenn Weible received training preparatory to his assignment in Canada. From October 29, 1948, until July, 1949, plaintiffs resided in Canada with intent to remain there indefinitely and until plaintiff Glenn Weible's assignment in that country should be completed. At all times during the taxable year 1948 [6] plaintiffs were bona fide residents of either Australia or Canada.

(f) All of the income of plaintiffs in 1948 consisted of salary paid to plaintiff Glenn Weible by

said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Australia and Canada.

6. The denial of plaintiffs' claim for refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiffs were and are entitled to have a refund of said amount paid with interest thereon.

7. Plaintiffs' said claim for refund has not been satisfied in whole or in part, and the total amount mentioned above is now due and owing from defendant.

For a Third Cause of Action, Plaintiffs Glenn and Patricia Weible Allege:

1. Paragraph 1 of the First Cause of Action of plaintiff Glenn Weible is hereby incorporated by reference as though fully set forth herein.

2. On or about March 15, 1950, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Joint Federal Individual Income Tax Return for the taxable year ended December 31, 1949, and concurrently therewith paid to the Collector of Internal Revenue the amount of One Thousand Three Hundred and Five and 70/100 Dollars (\$1,305.70).

3. Claim for refund was filed with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, for the amount of One Thousand Three Hundred and Five and 70/100

Dollars (\$1,305.70) on the ground that plaintiff's Federal Income Tax for said taxable year had been overpaid to that extent. A copy of said claim is attached hereto as Exhibit "C" and by [7] reference incorporated herein.

4. This claim was disallowed by the Collector of Internal Revenue and notice of said disallowance was given to plaintiffs by registered mail dated March 27, 1952; more than six (6) months have elapsed since the claim was filed.

5. The facts upon which plaintiffs based said claim and upon which this cause of action is founded are as follows:

(a) Plaintiff Glenn Weible was at all times herein a citizen of the United States; plaintiff Patricia Weible at all times mentioned herein was a citizen of Australia.

(b) Plaintiffs were married in 1948 in Australia and have been married since that time.

(c) Plaintiffs refer to paragraph 5(b) of the First Cause of Action of plaintiff Glenn Weible, and to paragraphs 5(d) and 5(e) of the Second Cause of Action, and by reference incorporate them herein.

(d) In July, 1949, plaintiff Glenn Weible was instructed by his said employer to proceed directly to the British branch of his employer to assist in the training of supervisory and factory personnel in methods and procedures for the manufacture of

cosmetic requisites in Great Britain. Plaintiff Glenn Weible agreed to accept said assignment and to remain in Great Britain for an indefinite period of time until the completion of said assignment. The nature of said assignment in Great Britain was such that an extended stay was necessary for its accomplishment. Plaintiffs resided in Great Britain throughout the year 1949 and until December, 1950, with the intent to remain in Great Britain for an indefinite period of time. At all times during the taxable year 1949, plaintiffs were bona fide residents of either Canada or Great Britain. [8]

(e) All of the income of plaintiffs in the taxable year consisted of salary paid to plaintiff Glenn Weible by said employer for personal services actually rendered by plaintiff Glenn Weible to said employer in Canada and England.

6. The denial of plaintiffs' claim for refund in the amount mentioned in paragraph 3 hereof was erroneous and illegal; plaintiffs were and are entitled to have a refund of said amount paid with interest thereon.

7. Plaintiffs' said claim for refund has not been satisfied in whole or in part, and the total amount mentioned above is now due and owing from defendant.

Wherefore, plaintiffs pray:

(1) Judgment for recovery by plaintiff Glenn Weible against defendant in his First Cause of

Action of \$696.13, with interest thereon as provided by law.

(2) Judgment for recovery by plaintiffs Glenn Weible and Patricia Weible against defendant in their Second Cause of Action of \$983.96 with interest thereon as provided by law.

(3) Judgment for recovery by plaintiffs Glenn and Patricia Weible against defendant in their Third Cause of Action of \$1,305.70 with interest thereon as provided by law.

(4) Judgment for recovery by plaintiffs of their costs herein.

(5) Such further relief as the Court shall deem just and proper.

THOMPSON & ROYSTON,

By /s/ CONRAD J. MOSS,

Attorneys for Plaintiffs. [9]

EXHIBIT "A"

Form 843

Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collector's Stamp: [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn Weible.

Business address: 1666 North Highland Avenue,
Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.
2. Period from: Jan. 1, 1947, to Dec. 31, 1947.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, \$1,320.13. Dates of payment: Withheld from wages by employer.

* * *

6. Amount to be refunded: \$696.13.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1951.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co., was sent to Australia in June, 1946, and worked in the Australian Branch of Max Factor & Co. during the entire year of 1947. Taxpayer returned to the United States in October 15, 1948, for instructions and training and then was sent to Canada on October 29, 1948, for work at the Canadian Branch of Max Factor & Co. During 1947, taxpayer established his residence in Sydney, Australia.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision of U.S. Court of Appeals, Second Circuit, in *Robert W. Seeley vs. Commissioner*.

/s/

Subscribed and sworn to before me this
 day of, 19....

.....

(Signature of Officer
 Administering Oath.) [10]

EXHIBIT "B"

Form 843

Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

Collector's Stamp: [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn
Weible and Patricia Weible.

Business address: 1666 North Highland Avenue,
Los Angeles 28, California.

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.
2. Period from: Jan. 1, 1948, to Dec. 31, 1948.
3. Character of assessment or tax: Income Tax.
4. Amount of assessment, \$983.96. Dates of payment: Withheld from wages by employer.

* * *

6. Amount to be refunded: \$983.96.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co., was sent to Australia in 1946 and worked in the Australian Branch of Max Factor & Co. during 1946, 1947 and until October 15, 1948. Taxpayer returned to the U.S.A. on 10/15/48 for instructions and training and was then sent to Canada on 10/29/48 for work at the Canadian Branch of Max Factor & Co. During 1948 taxpayer did not reside in the U.S.A. In July, 1949, taxpayer was sent from the Canadian Branch direct to Great Britain and remained there until 12/17/50. He returned to the U.S.A. in December, 1950, for instructions and assignment to work at the Argentine Branch of his employer.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision in Robert W. Seeley vs. Commissioner, U. S. Circuit Court of Appeals, Second Circuit.

/s/
.....

Subscribed and sworn to before me this
day of, 19....

.....
(Signature of Officer
Administering Oath.) [11]

EXHIBIT "C"

Form 843
Treasury Department
Internal Revenue Service

Claim
To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collector's Stamp: [Blank]

☒ Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Glenn Weible and Patricia Weible.

Business address: 1666 North Highland Avenue,
Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: 6th District, California.

2. Period from: Jan. 1, 1949, to Dec. 31, 1949.

3. Character of assessment or tax: Income Tax.

4. Amount of assessment, \$1,305.70. Dates of payment: Withheld from wages by employer, \$1,060.90; 2/15/50, \$244.80.

* * *

6. Amount to be refunded: \$1,305.70.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 of I.R.C. on March 15, 1953.

The deponent verily believes that this claim should be allowed for the following reasons:

Taxpayer, a U. S. Citizen, employed by Max Factor & Co. was sent to the British Branch of his employer and worked in Great Britain during the entire year of 1949. Taxpayer established his residence in Bournemouth, England, and returned to the U.S.A. on 12/17/50 for instructions and assignment to Argentine Branch of his employer.

Taxpayer claims exemption under Sec. 116 of I.R.C. Also see decision in Robert W. Seeley vs. Commissioner, U. S. Circuit Court of Appeals, Second Circuit.

/s/
.....

Subscribed and sworn to before me this
day of, 19....

.....,
(Signature of Officer
Administering Oath.)

[Endorsed]: Filed July 14, 1953. [12]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant in answer to plaintiffs' complaint and admits, denies and alleges:

First Alleged Cause of Action

I.

Defendant admits that this action purports to be brought under Sections 1340 and 1346 of Title 28, United States Code, and Sections 322 and 3772 of the Internal Revenue Code and does not exceed \$10,000.00.

II.

Admits the allegations contained in paragraph 2 thereof and alleges that the payment was made by the sum of \$127.00 accompanying the return, and \$1,193.13 as his community share of the withholdings by his employer and his wife's employer from their community earnings during the year 1947.

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically [13] admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant admits the allegations contained in paragraph 5 (a).

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (c), except that it denies that plaintiff was a bona fide resident of Australia during the year 1947.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except that it admits that no refund has been made on account of said claim.

Second Alleged Cause of Action

I.

For answer to the allegations contained in paragraph 1, defendant incorporates herein its answer to paragraph 1 of the first alleged cause of action.

II.

Denies the allegations contained in paragraph 2 except it admits that on or about March 15, 1949, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Federal

income tax return for the year ended December 31, 1948, showing a tax owing of \$983.96, which amount was paid to said Collector by withholdings from the earnings of Glenn B. Weible by his employer, Max Factor and Company. [14]

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (a), except that it admits that the plaintiff Glenn Weible was at all times mentioned a citizen of the United States.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) For answer to the allegations contained in subparagraph (c) defendant incorporates herein its answer to the allegations contained in paragraph 5 (b) of the first alleged cause of action.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d), except that it denies that the plaintiff Glenn Weible was a bona

fide resident of Australia during the period June, 1946, to October 15, 1948.

(e) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (e), except that it denies that the plaintiff Glenn Weible was a bona fide resident of either Australia or Canada during the year 1948.

(f) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (f).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except defendant admits that no refund has been made on account of said claim. [15]

Third Alleged Cause of Action

I.

For answer to the allegations contained in paragraph 1, defendant incorporates herein its answer to paragraph 1 of the first alleged cause of action.

II.

Denies the allegations contained in paragraph 2 thereof except it admits that on or about March 15, 1950, plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a Fed-

eral income tax return for the year ended December 31, 1949, showing a tax due of \$1,305.70, and concurrently paid therewith, said sum, by paying \$244.80 in cash and by attaching thereto a withholding statement showing Federal income tax withheld from the earnings of Glenn B. Weible by his employer, Max Factor and Company, of \$1,060.90.

III.

Defendant admits the allegations contained in paragraph 3, except that it denies any allegations contained in said claim not herein specifically admitted.

IV.

Defendant admits the allegations contained in paragraph 4.

V.

(a) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (a), except that it admits that the plaintiff Glenn Weible was at all times mentioned a citizen of the United States.

(b) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (b).

(c) For answer to the allegations contained in subparagraph (c), defendant incorporates herein its answer to paragraph 5 (b) of the first alleged cause of action and paragraphs 5 (d) and 5 (e) of the second alleged cause of action.

(d) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (d), except that [16] it denies that plaintiffs were bona fide residents of either Canada or Great Britain during the year 1949.

(e) Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5 (e).

VI.

Defendant denies the allegations contained in paragraph 6.

VII.

Defendant denies the allegations contained in paragraph 7, except that it admits that no refund has been made on account of said claim.

Wherefore, having fully answered, defendant prays that the complaint be dismissed at plaintiffs' costs.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 11, 1954. [17]

[Title of District Court and Cause.]

PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM

1. Defendant's Exhibit A for Identification is not admissible in evidence for lack of proper authentication.

Statutory authority for admission of foreign documents into evidence as an exception to the hearsay rule provides as follows:

28 U.S.C., Sec. 1741: "A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the [17-A] seal of his office, that the copy has been certified by the lawful custodian." (Emphasis added.)

Federal Rule of Civil Procedure 44 (a): "Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. * * * If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation,

consul general, consul, vice counsel, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.” (Emphasis added.)

Defendant’s Exhibit A for Identification consists of two parts: (1) A letter dated June 24, 1954, addressed to Eldon P. King, Esq., by P. S. McGovern, Commissioner of Taxation, and (2) a document entitled “Statement for Commissioner of Internal Revenue, Washington, D. C., United States of America.”

Part 1, the letter dated June 24, 1954, is merely a letter of transmittal. It in no way complies with the statutory authority set out above nor does it authenticate its enclosures pursuant to the Statute or Rule. Furthermore, that transmittal letter has no relevance to the issues of this trial.

Part 2 is inadmissible because not authenticated in the manner required by the law as set forth above. Both 28 U.S.C., [17-B] Sec. 1741, and Fed. Rule 44 (a) require that a foreign document to be admissible in evidence, must be certified or attested by the lawful custodian of the document and be certified by an appropriate United States official that such person is the lawful custodian. Nowhere does it appear on this document that the person preparing it, P. S. McGovern, had the legal custody of the documents set forth in items 4 and 5 of the Statement. On the contrary, it appears on the face

of the documents that P. S. McGovern was not the custodian, but rather that the documents which P. S. McGovern purports to copy were filed with an entirely different agency than the agency in which he held office, i.e., the Secondary Industries Commission.

The authentication is further insufficient in that the certification of the consular officer does not certify that P. S. McGovern was the lawful custodian of documents which he purported to copy.

The entire statement of P. S. McGovern is hearsay, and since it does not fall within any exception to the hearsay rule, it is inadmissible in evidence.

2. Even if admissible in evidence, Defendant's Exhibit A for Identification does not contradict the conclusion that Plaintiff Glenn Weible was a bona fide resident of Australia in 1947 and 1948.

Glenn Weible and Michael Harris both testified that the length of Weible's assignment in Australia was indefinite since it depended on how long it would take Weible to set up a new manufacturing plant in Australia, and that it was not possible to predict a definite period for that project. They further testified that Weible agreed and intended to stay in Australia until the assignment was completed. Nothing in the purported application of Weible to the Secondary Industries Commission indicates a contrary intent. The completion in the application of the item [17-C] "Date of Departure Anticipated" as November, 1947, was no dechra-

tion of intent to depart at that time, but only a best guess as to when the job would be done. The explanation under the item, "Reasons for visit to Australia extending beyond twelve months" indicates Weible's view at that time as to the unpredictability of the length of his assignment in Australia and that any anticipation of his departure date must necessarily be uncertain.

3. The facts that plaintiff Glenn Weible retained an active membership in the Hollywood Athletic Club and a bank account in the United States are not inconsistent with his claim of bona fide residence abroad.

Almost all of the facts adduced at the trial are summarized and considered in Plaintiffs' Pre-trial Memorandum. In addition to these facts, Glenn Weible testified that he had retained an inactive membership in the Hollywood Athletic Club, of which he was an active member before he left this country. He further testified that this club affiliation enabled him to make certain club connections abroad, and that the dues for inactive membership were nominal. The retention of this membership is consistent with Weible's contention that he was a bona fide foreign resident. He dropped his active membership, indicating an intention to stay away for an extended and indefinite period. However, since inactive club membership afforded him an entree into some foreign clubs he retained an inactive membership at nominal cost.

Weible also testified that he retained his domestic bank account. Such conduct in no way conflicts with an intention to reside abroad. *Meals v. U. S.*, 110 Fed. Supp. 658; *Hamer*, 22 T. 343; *Pierce*, 22 T.C. 493.

Respectfully submitted,

THOMPSON. ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 2, 1956. [17-D]

United States District Court for the Southern
District of California, Central Division

No. 15,717-T—Civil

GLENN WEIBLE and PATRICIA WEIBLE,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

The above case came on regularly for trial on January 9, 1956, before the Honorable Ernest A.

Tolin, United States District Judge, sitting without a jury, the plaintiffs appearing through their counsel, Clifford E. Royston and Conrad J. Moss, by Conrad J. Moss, Esq., and the defendant appearing through its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California; Edward R. McHale, Assistant United States Attorney for said district, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney for said district, by Edward R. McHale, Esq., and evidence both oral and documentary having been received, the Court having duly considered the same and on March 23, 1956, having directed the entry of judgment in favor of the defendant, the Court now finds as follows: [19]

Findings of Fact

I.

The plaintiffs, Glenn and Patricia Weible, are residents of the Southern District of California, who are suing in his or her own right.

II.

The amount in controversy is less than \$10,000.00.

III.

Plaintiff, Glenn Weible, filed on March 15, 1948, his income tax return for the calendar year 1947 and paid the sum of \$1,320.13 federal income taxes for that year. On January 31, 1951, plaintiff Glenn Weible filed with the Collector of Internal Revenue for the Sixth District of California a claim for

refund of income taxes for the calendar year 1947, claiming an overpayment in the amount of \$696.13. Said claim was rejected by the defendant on March 27, 1952, and this action was filed on July 14, 1953.

IV.

On March 15, 1949, the plaintiffs filed with the Collector of Internal Revenue for the Sixth District of California a joint income tax return for the calendar year 1948 showing a tax owing of \$983.96, which amount was paid to said collector by withholdings from the earnings of Glenn B. Weible by his employer, Max Factor & Company.

V.

Plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, claiming an overpayment in the amount of \$983.96. Defendant rejected the claim on March 27, 1952; this action was filed timely on July 14, 1953.

VI.

On March 15, 1950, plaintiffs filed with the Collector of [20] Internal Revenue for the Sixth District of California a joint income tax return for the calendar year 1949 showing a tax due of \$1,305.70, and concurrently paid therewith, said sum, by paying \$244.80 in cash and by attaching thereto a withholding statement showing federal income tax withheld from the earnings of Glenn B. Weible by his employer, Max Factor & Company, in the sum of \$1,060.90.

VII.

Plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Sixth District of California on January 31, 1951, claiming the amount of \$1,305.70 had been overpaid for the calendar year 1949. The defendant rejected the claim for refund on March 27, 1952; this action was commenced July 14, 1953.

VIII.

In Glenn Weible's claim for refund for the calendar year 1947 and in Glenn Weible's and Patricia Weible's joint claims for refund for the calendar years 1948 and 1949, the taxpayers claimed that they had overpaid their federal income taxes by reason that the taxes paid were computed upon income which was allegedly exempt from taxation under § 116 of the Internal Revenue Code of 1939.

IX.

In September, 1945, Glenn Weible entered into employment with Max Factor & Company, a domestic corporation engaged in the manufacture of cosmetic products, as its representative to train personnel in its foreign branches, to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for said employer. Glenn Weible was a chemical engineer who had worked for Max Factor & Company prior to the war. Before commencing his overseas assignment he underwent in 1945 and 1946 a short refresher course in the [21] California plant of the company.

In 1945 Glenn Weible was married to Jean Burt Weible, who was head of the hairdressing department of Warner Bros. Pictures in Burbank, California. They had no children.

X.

Early in 1946 Glenn Weible and his then wife, Jean Burt Weible, spent two or three months in Mexico. Glenn Weible and Jean Burt Weible maintained an apartment in North Hollywood, California, and owned household goods and an automobile. They also jointly owned an unimproved residential lot located in Los Angeles. Glenn Weible also maintained a membership in a private club, the Hollywood Athletic Club, during the years involved.

Prior to Glenn Weible's departure for Australia in June of 1946, Glenn Weible and his then wife, Jean Burt Weible, decided she would not accompany him to Australia, but maintain the apartment in North Hollywood and join him later.

XI.

Glenn Weible was employed by Michael Harris, a Vice-President of Max Factor & Company in charge of the export division. There was no written contract or written memorandum of contract entered into between Glenn Weible and his employer. The nature of the employment upon which Glenn Weible was to embark was to be in connection with the expansion overseas of the manufacturing operations of Max Factor & Company. In 1945 and 1946, the company had plans to establish manufacturing plants in Australia and the Far East, that is,

Shanghai, Tokio, the Philippines and China. Glenn Weible was to be sent to a particular foreign place to set up a factory to train citizens of the particular foreign country in the Max Factor manufacturing processes and when the operation was running smoothly with said citizens in charge, to leave. [22] No particular length of time was fixed for his sojourn in any of the countries to which he was to be sent.

XII.

Glenn Weible traveled to Sydney, Australia, in June of 1946, and as part of the Max Factor team of key employees to assist in setting up a manufacturing branch there. During 1946 his wife, Jean Burt Weible, wrote him from Los Angeles and informed him she desired a divorce. Prior to leaving the United States Glenn Weible sold his automobile and left his household goods with his wife. Jean Burt Weible obtained a divorce from Glenn Weible in 1947. In connection with the divorce, Glenn Weible purchased from his wife for \$7,500.00 her joint interest in the unimproved residential lot located in Los Angeles, California. During all the years involved in the litigation, the plaintiff, Glenn Weible, continued to make substantial payments on the trust deed encumbering the vacant residential property located in Los Angeles.

XIII.

All the income involved in the claims for refund in this action are attributable to the earnings of Glenn Weible for personal services rendered Max

Factor & Company and paid to Glenn Weible by deposit to his bank account in Los Angeles by Max Factor & Company. The income tax returns of Glenn Weible were prepared for him by accountants of Max Factor & Company in Los Angeles, California.

XIV.

While in Sydney, Glenn Weible rented a furnished apartment on a one-year lease, and bought such necessary items as bedding and mattresses, kitchen utensils and china. He employed a housekeeper. [23]

XV.

Glenn Weible secured exemption from the Australian income tax laws by filing with the Australian Government a statement that he was a non-resident of Australia; that his usual place of residence was the United States of America and that he anticipated leaving Australia in November, 1947. Because the Australian operation took longer than anticipated, Glenn Weible actually stayed in Australia until October, 1948. From the period following June 15, 1948, he was not regarded as exempt from Australian taxes by the Australian Government. However, his income for the period June 15 to June 30, 1948, was not large enough to subject him to the tax and only the income from July 1, 1948, to October 9, 1948, was subjected to the tax.

XVI.

During his stay in Australia Glenn Weible met and became engaged to Patricia. At the conclusion

of the Australian venture and after the manufacturing plant was manned by the Australian personnel, Glenn Weible returned to the United States in October, 1948, for a two weeks' stay. His divorce having become final, he married in the United States his present wife, Patricia Weible.

XVII.

Glenn Weible was then sent to Toronto, Canada, by Max Factor & Company, to set up a manufacturing establishment for a new product and container which had never been manufactured in Canada. He and Patricia Weible rented a furnished apartment in Toronto, Canada. They remained there until June of 1949, when the company ordered him to England in July, 1949, to assist in the training and supervision of factory personnel in the methods and procedures of the manufacture of its products. The Weibles remained continuously at the British branch until [24] December, 1950, when he was called back to the United States, for two months' training before being sent on an assignment to South America.

XVIII.

Glenn Weible entered into employment with Max Factor & Company with the intention of setting up manufacturing branches wherever the company would send him, whether Australia, the Far East, or elsewhere. He never, during the years involved, had the intention of becoming a permanent resi-

dent of either Australia, Canada, England or any other particular foreign country.

XIX.

During the year 1947, Glenn Weible, and during the years 1948 and 1949, Glenn and Patricia Weible, were residents of the United States of America.

XX.

During the years in question the plaintiffs or either of them did not establish permanent homes in any of the countries in which they sojourned. They did not buy or establish a permanent residence or home in any of the countries. Glenn Weible's intent throughout the period was to remain an employee of Max Factor & Company and he never had an intent to remain in any of the countries in which he sojourned other than as an employee of Max Factor & Company. He never intended to leave Max Factor & Company's employment and seek permanent employment in any of the countries in which he sojourned.

XXI.

By its very nature, his tour of duty in a foreign country for Max Factor & Company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country. [25]

XXII.

Any conclusion of law herein which is deemed to be a fact is hereby found as a fact and incorporated herein as a finding of fact.

Conclusions of Law

From these facts the Court concludes as follows:

I.

This Court has jurisdiction of this controversy and of the parties hereto.

II.

Plaintiff Glenn Weible was not a bona fide resident of Australia for the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939, and therefore, his earnings from his employment from Max Factor & Company during said year are taxable.

III.

The plaintiffs Glenn Weible and Patricia Weible were not bona fide residents of Australia or Canada during the calendar year of 1948, but were residents of the United States, and therefore the earnings of Glenn Weible from Max Factor & Company during said year were taxable.

IV.

Glenn Weible and Patricia Weible were not bona fide residents of Canada and England in 1949, but were residents of the United States, and therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

V.

Any finding of fact herein which is deemed to be a conclusion of law is hereby concluded as a

matter of law and incorporated herein as a conclusion of law. [26]

VI.

Defendant is entitled to judgment that the plaintiffs take nothing by reason of this action, that the complaint be dismissed with prejudice, and that it have judgment for its costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed:

That the plaintiffs take nothing by their complaint; that the complaint may be and is dismissed with prejudice and that the defendant have judgment for and shall recover from plaintiffs the amount of its costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated this 5th day of April, 1956.

/s/ ERNEST A. TOLIN,

United States District Judge.

Affidavit of Service by Mail attached.

Lodged March 30, 1956.

[Endorsed]: Filed April 5, 1956.

Docketed and entered April 6, 1956. [27]

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL AND FOR
AMENDMENTS TO FINDINGS OF FACT
PROPOSED BY DEFENDANT

Plaintiffs request the following additions and amendments to the findings of fact proposed by defendant (references are to paragraph numbers of defendant's proposed findings of fact):

X.

Delete the following words on page 4, line 12:

“during the years involved,”

and substitute therefore the following phrase:

“which he changed to an inactive membership during the years involved.”

XI.

Delete the period at the end of the last sentence on page 4 and insert the following:

“, and to undertake another foreign assignment for his employer. Weible and his employer agreed that he would remain continuously outside of the [28-A] United States in the performance of his duties except for short periods of training and consultation.”

XII.

Insert the following after the first sentence ending on page 5, line 6:

“No definite time was set by either Weible or his employer for the completion of that

project because they were unable to predict how long it would take. Weible agreed to remain in Australia until the assignment was completed.”

XIV.

Add the following at the end of the paragraph:

“He frequented a local club and actively entered into the social life of Sydney. His friends and associates were predominantly Australians.”

XV.

Delete this paragraph in its entirety and substitute the following in its place:

“Weible secured exemption from the Australian income tax laws for the first two years of his stay there, and after the expiration of the exemption period paid tax on his income from July 1, 1948, to October 9, 1948.”

XVII.

Add the following sentence at the end of the first sentence at page 6, line 27:

“No definite time was fixed by Weible or his employer for the length of his stay in Canada, but he agreed to stay as long as necessary to accomplish his assignment.” [28-B]

XVIII.

Delete the last period and the following at the end of the paragraph:

“, but intended to remain abroad for an indefinite period in the foreign service of Max Factor.”

XX.

Delete this paragraph.

XXI.

Delete the word “a” in the first line thereof at page 7, line 29, and substitute therefore the words “anyone.”

Reasons and Authority

1. Whether a person is a bona fide foreign resident within the meaning of the Internal Revenue Code depends upon all of the aspects of his life in a foreign country (Plaintiffs' Pre-trial Memorandum, pp. 4-6). The deletions and amendments requested in paragraphs X, XI and XIV amplify the findings of fact to include important aspects of plaintiffs' life abroad.

2. An intent to remain abroad for an indefinite period is an important factor in determining bona fide residence abroad. The indefinite character of Weible's employment abroad is covered by the amendments requested to paragraphs XI, XII, XVII and XVIII.

3. The amendment to paragraph XV is requested for the reason that the statement referred to in defendant's proposed finding was inadmissible in evidence for the reasons stated in Plaintiffs' Supplemental Memorandum.

4. Paragraph XX is immaterial to the issues of this case for the reasons stated in Plaintiffs' Pre-trial Memorandum, page 8, lines 4-12.

Respectfully submitted,

THOMPSON, ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS.

Receipt of copy acknowledged.

[Endorsed]: Filed April 5, 1956. [28-C]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

Notice Is Hereby Given that Glenn Weible and Patricia Weible, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 6, 1956.

Dated May 8th, 1956.

/s/ CONRAD J. MOSS, for
THOMPSON, ROYSTON,
WIENER & MOSS,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1956. [29]

In the United States District Court, Southern
District of California, Central Division

No. 15717-T

Honorable Ernest A. Tolin, Judge Presiding.

GLENN WEIBLE and PATRICIA WEIBLE,

Plaintiffs,

vs.

UNITED STATES,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

January 9, 1956

Appearances:

For the Plaintiffs:

CONRAD J. MOSS,

433 South Spring Street, Suite 705,

Los Angeles, California.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, by

EDWARD R. McHALE,

Assistant United States Attorney,

600 Federal Building,

Los Angeles, California.

Monday, January 9, 1956—2:00 P.M.

The Court: Call our calendar, please.

The Clerk: 15,717, Glen Weible, et al., v. United States, for trial.

The Court: Are you ready for trial?

Mr. Moss: Ready for the plaintiffs, your Honor.

Mr. McHale: Ready for the defendant.

The Court: How long do you expect the presentation will require?

Mr. Moss: Approximately two hours to put on the plaintiffs' case, I believe, your Honor.

Mr. McHale: Our case will consist of cross-examination primarily.

The Court: All right. Proceed.

Mr. Moss: Your Honor, I was just discussing one factual issue with the counsel for the defendant, with respect to one of the claims for refund alleged in the Complaint, the filing of which is admitted. One of the facts respecting it, I would like to take a moment to verify that point.

The Court: Surely.

Mr. Moss: Your Honor, this is an action for refund of taxes, income taxes, paid to the United States for the taxable years 1947, 1948 and 1949.

The plaintiff has filed a pretrial memorandum setting [2*] forth summary statement of the facts, and memorandum about the law. There is, as the memorandum states, one issue before the Court, and that is, whether or not the plaintiff Glenn Weible in the year 1947, and the plaintiffs Glenn and Pa-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

tricia Weible in the years 1948 and '49, were bona fide residents of a foreign country or countries, within the meaning of the 1939 Internal Revenue Code, Section 116(a).

To clarify that point, plaintiff Glenn Weible in 1947 filed a return with his then wife—I beg your pardon. He filed a separate return reporting half of the community income of himself and then wife, who was divorced in September, 1947, and married in the latter part of 1948 to his second wife. And his returns for 1948 and '49 were joint returns.

The filing of the returns and the payment of the tax has been admitted, as has the filing of the claims for refund, as alleged in the Complaint, leaving us just one factual issue as to bona fide residence.

The plaintiff will call two witnesses, Mr. Michael Harris, vice president of the Max Factor Company, the employer of Glenn Weible, and Glenn Weible himself.

At this time the plaintiff would like to call Mr. Michael Harris to the stand.

Will you take the stand, Mr. Harris? [3]

MICHAEL HARRIS

called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, please?

The Witness: Michael Harris.

Direct Examination

By Mr. Moss:

Q. What is your position, Mr. Harris?

A. Vice president, export division of Max Factor & Co.

Q. In what capacity? What are your duties with that company?

A. Complete supervision of our export division and our overseas activities.

Q. Were you in this position in the years 1946 and after? A. Yes; since 1933.

Q. In that position, have you been concerned with the work assignments of Glenn Weible, the plaintiff in this case?

A. Yes, he comes directly under my supervision.

Q. Are you familiar with the facts concerning the employment of Mr. Weible by the company?

A. Yes, I am.

Q. Can you tell me when he was first employed at Max Factor? [4]

A. In the late 1930's; before the war.

Q. Do you recall what his duties were at that time?

(Testimony of Michael Harris.)

A. Primarily chemist, working in our laboratories.

Q. What did he have to do as a chemist?

A. He was in charge in developing new products, checking formulas, testing materials.

Q. Has he worked for Max Factor since that time?

A. Yes. He left Max Factor during the war years and returned in 1945 or early '46. He has been with us since that time continuously.

Q. 1945, at the time that you stated Mr. Weible was re-employed, what was the nature of the export activities of Max Factor?

A. We were just arranging to re-embark on a very wide expansion program overseas, a program which we had already begun working with when the war stopped us.

We had in mind opening branches in about a half a dozen countries throughout the world immediately the hostilities ceased. Mr. Weible had been working with Lockheed and when the war activities at Lockheed dropped off, he reopened his discussions with us about resuming his activities with us.

Because of the widened scope of his activities at Lockheed, we felt that Glenn could be very useful as an addition to our overseas staff in actually setting up complete factory operations. [5]

Q. You employed him then in what capacity in 1945, when you re-employed him?

A. He was to come in for a period of preliminary training, to sort of have a refresher course

(Testimony of Michael Harris.)

and immediately go overseas, with the first installation to be in Australia and from then on, wherever required.

Q. What was the nature of your employment agreement with Mr. Weible with respect to his duties overseas?

A. We had no formal agreement, if that is what you mean. We had no written contract or memorandum. We operated on a very informal basis.

Mr. Weible first discussed the proposal with Mr. Max Factor, Jr., the head of our laboratories, and then I was brought into the picture and he was put under my supervision.

Q. Was he employed to work exclusively in the foreign department?

A. Yes, exclusively in the foreign department and exclusively overseas.

Q. Was there anything said in your employment arrangement with respect to how long Mr. Weible would be required to remain overseas?

A. For each assignment it was completely indefinite, because we had no idea how long it would take us to establish a plant. He would stay with an operation until we thought it was on its feet and ready to move to another location. [6]

Q. When he finished one assignment, what was your understanding with respect to subsequent assignments?

A. He would then proceed wherever instructed or, if necessary, come back for a training period in between assignments.

(Testimony of Michael Harris.)

Q. Subsequent assignments would be overseas or domestic? A. Overseas entirely.

Q. Has Mr. Weible been employed in your department since that time?

A. Yes, continuously.

Q. Do you recall what Mr. Weible's first assignment was for Max Factor after his re-employment in 1945?

A. Yes. He went to Australia. We opened a plant in Sydney. We picked up a shell of a building and started from scratch. Mr. Weible was in charge of arranging for the importation and installation of necessary equipment and machinery, the arrangements for local production of containers, packages, supplies, the installation of a complete factory operation, the training of local chemists, sales department, et cetera.

Q. Do you recall whether he went to Mexico before he went to Australia?

A. He was in Mexico for a two- or three-month period. I am not sure whether it was just before he went to Australia or between the time he came back from Australia and went to [7] Canada. There was a two- or three-month interval there somewhere.

Q. At that time Mr. Weible went to Australia, had the company any plans relating to other offices in the Far East?

A. Yes, we already owned property in Shanghai and it was our intention to establish a factory and a branch operation for China, and also in Tokyo. We had an arrangement in the Philippines,

(Testimony of Michael Harris.)

which later also became a factory branch. So there were four operations we had in mind at the time in the Far East.

Q. At the time Mr. Weible was sent to Australia, was any definite time fixed for the time he would remain there on that job?

A. No, sir, except that he was to stay there until we had trained an Australia crew, equipped to take over.

Q. Could you in the company fix any time within which that operation would be established?

A. No, we could not. We had operations of that type that took from three months to five years to get under way.

Q. Was anything said to Mr. Weible at the time he left for Australia regarding what his following assignment would be or how did you leave that?

A. No, there was no arrangement for that at all.

Q. And then do you recall how long he stayed in Australia? [8] A. About two years.

Q. Do you recall specifically within the year—that would make it 1948—when he was recalled?

A. I think he came back shortly after midyear of '48.

Q. And what were the circumstances relating to his recall from Australia?

A. The job in Australia was operating pretty well on its own. We had Mr. Weible come back to Hollywood then for a matter of two or three weeks, I believe—not over a month, anyway—and then sent him to Canada as his next assignment. My recollec-

(Testimony of Michael Harris.)

tion would be he came back from Australia in August or September and was in Canada within the next month.

Q. What was your understanding with Mr. Weible with regard to the length of time of his Canadian assignment?

A. There were no terms arranged. It was more or less the same as the Australian operation. We were starting from scratch in Canada on a manufacturing operation.

Q. And would you describe what his duties were in Canada, to the extent they may have been different than those you have already described for Australia?

A. Yes. In Canada we already had a sales organization for a number of years, but we did no manufacturing. We were at this time developing a number of new products and decided that was a good opportunity for starting the manufacturing in Canada. [9]

Q. Then, as I understand you, there had been prior to Mr. Weible's visit no manufacturing branch at all of any kind in Australia?

A. That is right.

Q. That was an import arrangement?

A. A straight import before the war, finished packages ready for sale.

Q. Do you recall how long Mr. Weible remained in Canada? A. About a year.

Q. Do you recall the circumstances surrounding his departure from Canada?

(Testimony of Michael Harris.)

A. Yes, very well. We ran into trouble in our British manufacturing plant and found it necessary to send a complete team over from the States. We called Mr. Weible in Toronto and asked him if he could get over to England immediately. He didn't come back to Hollywood. He went directly to England.

Q. What was to be his task in England?

A. To take over our manufacturing laboratories and operate them until we could replace the staff with whom we were having trouble.

Q. Was any fixed time, any definite period set for the completion of this task?

A. No, there was no time limit set. [10]

Q. Did Mr. Weible fix any definite time on the length of his stay in England on this assignment?

A. No, I don't believe there was even any discussion as to that.

Q. Do you recall how long Mr. Weible remained in Great Britain on this assignment?

A. It was over two years.

Q. Do you recall when he went to England, the date when he left for England, approximately?

A. I am trying to tie it into the time when I went over, too, because I was part of that team.

Q. Yes.

A. I think Mr. Weible went over in midsummer of 19—let's see, '46, '48; that would be '49.

Q. Then you say he stayed for approximately——

(Testimony of Michael Harris.)

A. He stayed something over two years in England and on the continent.

Q. How long, do you recall, was he in England most of the time or on the continent?

A. He was in England for a year and a half. And then after his duties in the plant eased up a little, he visited some of our branches on the European continent.

Q. When he was recalled from England, was his job, or was the job of setting up the manufacturing operation, the reorganization, completed? [11]

A. Yes, we had a new staff hired and trained, ready to take over.

Q. Then what was done with Mr. Weible?

A. Mr. Weible came back again for several weeks at home, and we then assigned him to South America. We had a program for opening branches then in Argentina, Brazil and Colombia.

Q. How long did he remain in South America on this assignment?

A. From that time until now. He just come back. I think he has been back twice within that four-year period.

Q. What was the nature of his return visits?

A. Once he was brought in because of illness of his mother. He was here a couple of weeks.

The other time would have been a regular holiday, homecoming.

Q. Do you know whether Mr. Weible has or has not maintained a residence in the United States during this period, subsequent to 1946?

(Testimony of Michael Harris.)

A. So far as I know, he has no residence here.

Q. Do you know who prepared and filed the income tax return for Mr. Weible during the years '47, '48 and '49?

A. Our accounting department. They handled the returns for all our traveling overseas personnel.

Q. Would those returns, as they are alleged in the Complaint, show that the tax was paid by—the tax on Mr. [12] Weible's income in those years was paid by withholding from the Factor Company, do you recall?

Do you recall the circumstances surrounding the withholding of income tax on Mr. Weible's return during those years?

A. Yes, there were some discussions among our accountants and heads of our legal department, and among us we decided, as long as there seemed to be some possible doubt as to the Government's interpretation of overseas residence we would withhold and play doubly safe. I think that went on for three or four years.

Mr. Moss: No further questions.

Cross-Examination

By Mr. McHale:

Q. Mr. Harris, there was no written contract of any kind with Mr. Weible? A. That is right.

Q. Was Mr. Weible the only person sent from Max Factor to Australia in 1946, or did you send other persons?

(Testimony of Michael Harris.)

A. No, Mr. Sidney Factor went to Australia several weeks before Mr. Weible and remained in Australia almost two years. Most of that time overlapped Mr. Weible's.

We then had a third member, a sales manager, whom we sent over, a Mr. Sidney Myer, who was there during the second year of Mr. Weible's stay and then remained after Mr. Weible had left. [13]

Q. Just what was Mr. Weible's assignment on this trip to Australia?

A. To set up a manufacturing plant, to install the machinery, get it, purchase it, train an operating crew, and arrange for the local production of whatever supplies we could obtain in Australia.

Q. Was he to hire local personnel to operate and manage the plant? A. Yes.

Q. And did the local Australians eventually take over the management and operation of the plant?

A. Yes, we now have a 100 per cent Australian operation.

Q. Have you followed that pattern in your other operations? A. Yes, that is our basic policy.

Q. In other words, Mr. Harris, what you do is send someone over from your company to set it up, but it is the idea of the company to be replaced by local personnel in the various countries? Is that the general method of operation?

A. That is quite correct.

Q. The same would be true for your Canadian operation, when you sent Mr. Weible to Canada?

A. Yes.

(Testimony of Michael Harris.)

Q. There were other people from Max Factor sent also?

A. Yes, we sent sales personnel and administrative heads, [14] also.

Q. He was to set up the manufacturing and train local personnel to take over the operation?

A. That is right.

Q. Do you know any of the details of the way his salary payments were handled when he was sent to Australia?

A. Our general pattern there—and I think it applied to Mr. Weible throughout that period—was to deposit his checks in his bank account here in the United States.

Q. Then Mr. Weible maintained a bank account here in Los Angeles, or in California?

A. Yes, I am sure he did.

Q. To your knowledge did Mr. Weible maintain any other property here in this country?

A. Mr. Weible owned a lot. I think it was—I am not sure whether it was before he went to Australia or when he came back from that trip. I believe he still owns that vacant piece of property.

Q. Any other property that you know of?

A. None that I know of.

Mr. McHale: That is all.

Mr. Moss: I have no further questions.

The Court: Thank you, sir.

The Witness: Thank you.

(Witness excused.) [15]

Mr. Moss: The plaintiff, Mr. Weible, will now take the stand.

GLENN WEIBLE

a plaintiff herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your full name, sir?

The Witness: Glenn Weible.

Direct Examination

By Mr. Moss:

Q. What is your profession, Mr. Weible?

A. Chemical engineer.

Q. What academic training, if any special training in this field, do you have?

A. I am a graduate chemical engineer and have had several years of training in work.

Q. When did you first go to work for Max Factor?

A. In 1938.

Q. What was the nature of your work there?

A. Chemist in the laboratory, doing various types of compounding.

Q. What is "compounding"?

A. In this particular case, trying to formulate new products of various types. [16]

Q. Do you recall the date when you left your employment with Max Factor?

A. July, 1941.

Q. What were the circumstances leading to your leaving at that time?

(Testimony of Glenn Weible.)

A. I was acquainted with various personnel at Lockheed Aircraft and was informed they were just starting a research department which included a chemical research division, and it looked like a very important type of a job. So I applied and was employed as their first chemist, for Lockheed.

Q. What was the nature of your work while at Lockheed?

A. For three years I was in charge of the chemical research division, and then moved up to process engineer.

Q. What were your duties as process engineer?

A. They are in charge of all the various processes that have to do with the fabrication of the airplane.

Q. Could you be just a little more specific on what the processes were?

A. I should say the chemical processes.

Q. During the war years, did you have any contact with the Factor Company?

A. Toward '44 and '45 there were quite a few contacts, as they were doing some subcontract work at that time for the various aircraft companies. And actually, Lockheed gave them some jobs to do which were of a chemical nature and which I [17] had contacts through Max Factor, between Max Factor and Lockheed on these particular jobs.

Q. How long did you stay at Lockheed?

A. Until, I believe, September, 1945.

Q. Where did you go when you finished your employment with Lockheed?

(Testimony of Glenn Weible.)

A. I went back with Max Factor & Co.

Q. Will you describe the circumstances surrounding your re-employment with Max Factor?

A. Perhaps a year or six months before the actual employment, I had discussed on various occasions, or, had discussions with Max Factor, Jr., who had told me of an expansion program they planned, and I had indicated my desire to come back and work in this expansion program; primarily, setting up branches in foreign countries.

Q. Was anything said at that time with respect to the nature of your work, as between foreign and domestic service with Factor?

A. It was definitely for foreign work.

Q. It was anticipated you were to work only on foreign work, or partly on each?

A. No, it was only on foreign work.

Q. With whom at Max Factor did you make your final employment arrangements?

A. With Mr. Harris. [18]

Q. What was the nature of your employment agreement, arrangement with Mr. Harris?

A. Previous to my discussions with Mr. Harris, as I stated before, I had had discussions with Max Factor, Jr., and he had indicated they were interested in my coming with them and when I talked with Mr. Harris there was the formality of the actual filling out of the employment forms and so forth. There were no contracts, but I was to come back into the plant and work for a period of two or

(Testimony of Glenn Weible.)

three months and then go out on the first assignment.

Q. Did you have any specific understanding with respect to the length of time of your foreign assignments? A. No.

Q. Did you have any understanding at the beginning of your agreement with respect to what you would do when one foreign assignment was completed? A. No.

Q. Was it your understanding that you might be assigned back to the United States after one foreign assignment, or was there no understanding at all on that point?

A. No, in our original, our preliminary discussions there were many countries named where we wanted to get started as quickly as possible.

In fact, when I came back with Max Factor in '45 I purchased equipment for several countries at the same time, [19] duplicate and triplicate sets of equipment, which we did subsequently use in various countries, so that the general idea was as soon as one was finished we would go on to the next one and start.

Q. Now, after you resumed employment with Factor in September of 1945, what did you do right after that?

A. I worked in the plant becoming reacquainted with all the operations there. And also purchased equipment for various countries where we had operations planned. This took place from September

(Testimony of Glenn Weible.)

until December. And then in January, '46, I went to Mexico.

Q. How long were you in Mexico?

A. Until May, the latter part of April or the 1st of May.

Q. What were your duties in Mexico?

A. We set up—we had a partial manufacturing plant there, but we set up additional plant operations starting new products which they had manufactured heretofore.

Q. Then in May, '46, your assignment in Mexico was completed, and then what did you do?

A. I came back to the United States and left for Australia in June, 1st of June.

Q. What was your agreement with the company with respect to the length of time you would be gone to Australia, if there was one? [20]

A. There was no agreement as to the length of time, because none of us knew how long it would take to get the operation going. There were many restrictions, import restrictions, problems of raw materials, containers, and various things.

Q. Did you fix any definite time as to the length of time you would remain, consent to remain in Australia? A. No.

Q. Would you describe what you did on this assignment in Australia?

A. Well, we bought an old building, which it was necessary to do completely over, starting out with the contractor, architect's plans. We reworked the whole building, and then purchased and imported

(Testimony of Glenn Weible.)

various containers or other machinery, raw materials, installation of all the equipment in the building, and supplying suppliers of raw materials, purchasing—to see that they met our specifications, and training various personnel.

Q. Did you know before you went to Australia who would be your sources of supply or who would be your personnel? A. No.

Q. You located them after you arrived?

A. That is right.

Q. Do you recall how long you had been in Australia before the plant was set up in sufficient condition to start [21] manufacturing?

A. Almost one year.

Q. At the time you left Australia, do you recall what the size of the operation, including the personnel, was?

A. Yes, men and women, possibly 90 to 95 people.

Q. Who had trained these people?

A. All those having to do with manufacturing and shipping and so forth, I had trained. The sales personnel had been trained by other people.

Q. In your opinion was it possible to predict before you went to Australia that a definite time would be taken to accomplish this, the establishment of this manufacturing operation?

A. We considered it would be a year and a half to a two-year job.

Q. In fact, how long did it take?

A. I was there two years and four months.

(Testimony of Glenn Weible.)

Q. At the time you left on the Australia assignment, did you intend to stay there until it was finished? A. Yes.

Q. Was there any discussion at the time you left for Australia regarding any other operations in the Far Eastern area?

A. Yes. I also had purchased equipment to be shipped to China for operations in Shanghai, and had also worked over [22] some floor plans and blueprints for the operation there prior to going, and we had discussed the possibility of my leaving Australia and going direct to Shanghai when I had completed my work in Australia.

Q. Did you, in fact, do that?

A. No, the political picture was trying to change during that period and we didn't go ahead with our plant in Shanghai.

Q. You left for Australia in 1946. What did you do with your household goods?

A. My wife remained here at that time and the household goods remained with her. I sold an automobile I had. Aside from—my personal belongings and some electrical appliances, radio and phonograph, and so forth, I took with me the rest, remainder.

Q. Your first wife, you say she remained in the apartment? A. In the United States, yes.

Q. Was she employed at that time?

A. Yes, she was.

Q. What was the nature of her employment?

(Testimony of Glenn Weible.)

A. She was in charge of the hairdressing department at Warner Bros. Studio.

Q. The whole department or the hairdressing only?

A. No, in charge of the department. [23]

Q. Did you have any arrangements with your wife with respect to her joining you in Australia?

A. She had been down to Mexico with me part of the time, and due to the position she held it was impossible for her to go to Australia at that time. But we did discuss the possibility of her joining me at the end of a year, if we saw the operation was going to take considerable longer.

Q. Did she, in fact, join you?

A. No, she didn't.

Q. What happened there?

A. Before the year was up she had written me stating that she would like to get a divorce.

Q. What was the disposition of the family furniture and furnishings and other property which you had left in the apartment at the time of the divorce?

A. They all went to my wife.

Q. Did you retain any personal property in the United States after that settlement?

A. There was a piece of building property which we had jointly, and after I came back from Australia I purchase the half of it from her.

Q. You kept your bank account, also?

A. And the bank account was here, which at the time of the divorce was divided.

(Testimony of Glenn Weible.)

Q. Since that time have you maintained a residence of [24] any kind in the United States?

A. No, sir.

Q. Have you had any household furnishings stored for you here? A. No.

Q. What living arrangements did you make in Sydney?

A. I had an apartment partially furnished. The remainder of the furniture I purchased there.

Q. Do you recall what items you did purchase for the apartment?

A. Yes. Complete bedding, as well as mattresses, kitchen appliances, utensils and china.

Q. Do you recall whether you entered into a lease or there was a lease on that apartment?

A. Yes.

Q. Do you recall how long that was?

A. A year at a time.

Q. Who paid for the rent and utilities?

A. There was an allowance——

Q. Will you explain how payment was made for those things?

A. Well, we had a living allowance from the company, and this was paid out of this allowance.

Q. Did you do your own cooking and housekeeping? A. Had a housekeeper. [25]

Q. That you employed? A. Yes.

Q. When you first went there, did you live alone?

A. I was living with Sidney Factor, who was with me at the time.

(Testimony of Glenn Weible.)

Q. Did you do any entertaining when you were there? A. Yes, considerable.

Q. In your home or outside, or both?

A. Both.

Q. Who were your guests there? That is, can you tell us what proportion of them were Australians and what proportion were——

A. I would say more than 95 per cent were Australians.

Q. Who were these Australians, people you met there, business people?

A. Yes, they were business people. We were associating with them in business, and suppliers. There were many people employed in the government personnel, friends.

Q. Can you tell us who were some of the government people or officials that you had social contact with?

A. I was acquainted with William McKell, who was at that time Premier of South Wales and later became Governor General.

I also knew our Ambassador in Australia, the American Ambassador, and many of the other state officials in [26] South Wales.

Q. Did you ever visit the home of the your Australian friends? A. Yes, many times.

Q. And how frequently would you suppose you had social engagements with your Australian friends? A. At least once or twice a week.

Q. Did you make any club affiliations while you were in Australia?

(Testimony of Glenn Weible.)

A. Yes. I belonged to two clubs. One was the Tattersall Club, which is a sports and social club. It was not really a membership, but I was entitled to use the facilities of the club due to the membership of the club I had here, the Hollywood Athletic Club.

The other club was the American Club, formed while I was there. In fact, I helped to some extent to form this club, which is a social club for American people living in foreign countries, as well as some Australians or some nationals of the country.

Q. What is the makeup of the Tattersall Club?

A. It would be Australian people belonging to it. It is a men's club, mostly from a sports and athletic standpoint.

Q. Can you give us any idea how often you visited at the Tattersall Club?

A. Twice or three times a week. [27]

Q. Did you make any close personal friends while you were in Australia?

A. Yes, a number of very close friends.

Q. You have corresponded with these people?

A. Always at Christmastime we correspond, we send cards; sometimes during the year.

Q. Did you pay any income tax to the Australian Government?

A. The last four months I was there I paid income tax. The agreement in Australia, for foreign personnel working there, is that the first year they exempt you from income tax. The second year they will exempt you if you can show due cause why you

(Testimony of Glenn Weible.)

should remain a second year. But after the second year, then you must pay.

Q. How long did you remain in Australia?

A. Two years and four months.

Q. That would bring you to—when did you leave there? A. October, 1948.

Q. At the operation that you had been sent out to establish, had it been completed or were you called away before its completion?

A. No, it had been completed.

Q. Then what was your next assignment?

A. Canada.

Q. Did you go directly to Canada? [28]

A. I came back to Los Angeles for a period of three weeks, I believe, and then I went to Canada.

Q. You didn't come back alone this time, is that right? A. No.

Q. You came back with whom?

A. I came back with my wife-to-be, actually. We were married here, after we arrived. My present wife is Australian.

Q. Had you met her during your stay in Australia? A. Yes.

Q. Had you become engaged before you left?

A. Yes.

Q. Then you came back, you say, to the United States first. How long were you here?

A. Three weeks.

Q. What did you do during that period?

A. We had a new product which had been developed while I was away. I spent the time becom-

(Testimony of Glenn Weible.)

ing acquainted with the manufacturing of this product and also with the manufacturing of the container, and something on the sales side of the picture. And then I went to Canada to put this product into our manufacturing operation there, as well as some of the others.

Q. Had this product ever been manufactured in Canada? A. No.

Q. At the time you left, or at the time you returned, before you left for Canada, was anything said about the length [29] of stay that you would have in Canada on this assignment? A. No.

Q. Did you fix any definite period, periodic limitation on the time you would be there yourself?

A. No.

Q. Where did you go in Canada?

A. Toronto.

Q. Did you go with the then Mrs. Weible?

A. Yes.

Q. Were your problems in Canada substantially the same as those you have described for Australia? A. That is true.

Q. In your opinion, was it possible at the time you left to fix any definite time in which this assignment could be completed? A. No.

Q. What living arrangements did you make in Toronto? A. We had an apartment.

Q. Did you furnish it yourself?

A. Not the main furniture, but here again we did furnish bedding and china and kitchen utensils, appliances, kitchen appliances.

(Testimony of Glenn Weible.)

Q. Was the apartment furnished with most of these things, dishes, and so on?

A. No, we furnished all of those; we purchased those [30] ourselves.

Q. Did you shop for your own food or did your wife shop?

A. My wife usually did the shopping.

Q. Where did she purchase her food supplies?

A. At the various markets.

Q. The local markets?

A. Local markets.

Q. Was that same thing true in Australia, did you purchase your living supplies at the local markets? A. Yes.

Q. Will you describe the extent of your social life in the Canadian community?

A. Somewhat along the same lines as Australia. We had many Canadian friends. We knew a few more Americans there than we did in Australia due to the fact of being that there are several Americans in Toronto. But I should say 80 per cent of our friends were Canadian.

Q. Did you entertain these friends and did they entertain you?

A. Yes. Most of the entertainment was home entertainment.

Q. Can you make an estimate of how much time in the week was spent in social activity, either with friends or they with you? [31]

A. Perhaps two or three nights a week.

Q. How long did you remain in Canada?

(Testimony of Glenn Weible.)

A. Until July, 1949.

Q. What happened then?

A. I went to England.

Q. Will you describe the circumstances leading to your leaving Canada and going to England?

A. There was a complete reorganization of our British branch and several people from our head office went there at that time to fill in, until we could find and train British personnel to take over. I was one of the people who was selected to go there for this work.

Q. Did you take your wife with you to England?

A. Yes. I went, perhaps, two weeks before she did, but she followed.

Q. What did you do with the household equipment you purchased in Canada?

A. Some of the things we took to England with us. The rest were distributed among friends as gifts.

Q. What things did you take to England, do you recall?

A. There again we took electrical appliances, especially for the kitchen, some heaters, radio, phonograph, some bedding.

Q. At the time that you left for England, did you make any arrangements with Factor's as to how long you would be gone? [32] A. No.

Q. Any definite time limitation fixed for the length of your stay in England? A. No.

Q. How long was it intended you stay in England? What was to be the determining factor as to how long you would stay in England?

(Testimony of Glenn Weible.)

A. When the operation began functioning the way we expected it to.

Q. In your opinion was it possible at the time you left to fix any definite time for that period?

A. No.

Q. Was it your intention, when you left, to stay until the job was completed? A. Yes.

Q. How long, in fact, did you stay in England?

A. Until December, 1950.

Q. Were your duties in England the same as the ones you had in Canada and Australia, or did they differ?

A. Very much the same. It was to a great extent a production problem in England, as a branch had already been set up. The factory was in operation, but was not functioning correctly. They were very far behind with orders and production. Therefore, one of the first jobs was to get production up so that we could meet our commitments. [33]

Q. What was your position there in the company ladder?

A. I was in charge of manufacturing.

Q. You were the person in the management in charge of manufacturing? A. Correct.

Q. What living arrangements did you make in England?

A. We had a sort of an apartment in a hotel, but it did have a small kitchen arrangement with it. We did some of our own cooking and part of the meals we took in the hotel.

Q. Was there any reason in particular why you

(Testimony of Glenn Weible.)

didn't rent an apartment, like you had in the other places?

A. It was very difficult to find apartments in England at that time. It served our purpose quite adequately. It was a small neighborhood hotel, not one of the larger ones.

Q. Did you purchase any household or other property in England?

A. Yes, we did purchase china, dishes and some silver, various things of that nature.

Q. Did you have a car there?

A. Yes, we purchased a car, also.

Q. Would you describe again your social activities in England?

A. It was somewhat of the same nature as the other countries. Aside from the Max Factor personnel, we knew no other Americans, they were all English people. [34]

Q. Did you visit and have them visit you in the same manner as before? A. Yes.

Q. Did you make any club affiliations in England?

A. Yes, I belonged to the Poole Harbor Yacht Club, which is more or less of a social club also. This was really not a membership. It was an affiliation. I was allowed to go and use their facilities of the club.

Q. Did you have an account there or did you have to go with a member, or how did that work?

A. No, I was allowed to sign chips, so to speak,

(Testimony of Glenn Weible.)

for drinks or for meals; I had an account which I paid.

Q. Were you free to come and go by yourself?

A. Yes.

Q. How long did you remain in England?

A. 18 months.

Q. Pardon? A. 18 months.

Q. That would make it until when?

A. In December, 1950.

Q. Where did you go at that time?

A. Returned to the United States.

Q. How long were you in the United States?

A. I was here until the 1st of February, and then went to South America. [35]

Q. On a foreign assignment for Max Factor?

A. Yes. I first went to Argentina, and since that time I have lived in Argentina, Chile, Colombia, Brazil.

Q. Since the time you went to Argentina, have you returned to the United States at all?

A. In March, 1953, I was here for two weeks. My mother passed away and I came home.

Q. Were there any other times when you returned? A. No.

Q. Did you learn the language in South America? A. Yes; Spanish and Portuguese.

Q. At any time since you went to work for Max Factor in 1945, have you expressed any limitations as to the length of time you would agree to stay overseas? A. No.

Q. Was it your intent at all times during this

(Testimony of Glenn Weible.)

employment to work in the foreign department, in overseas assignments? A. Yes.

Q. Who prepared your tax return in 1947, do you recall?

A. The accounting department of Max Factor. I believe Mr. Jack Abrams is in charge of the department.

Q. The company withheld part of your salary for payment of federal income taxes during that period, and then in 1948 and '49, also, whose decision to withhold was that?

A. It was the decision of Mr. Michael Harris. [36]

Q. In 1948 and '49, I take it the returns were also prepared by the accounting department?

A. Yes.

Q. And they were sent to you for execution?

A. Yes.

Q. And was the income reported in each of those returns income you received from Max Factor for your services which you have just described while employed in the foreign department?

A. Yes.

Mr. Moss: No further questions.

Cross-Examination

By Mr. McHale:

Q. Mr. Weible, just for our benefit, what does Max Factor manufacture? A. Cosmetics.

Q. I think you stated that when you were in

(Testimony of Glenn Weible.)

Australia you had connections with one club because of some club membership you had in the United States. What club was that in the United States?

A. The Hollywood Athletic Club.

Q. How long did you retain a membership in that club?

A. I had had the membership since 1940, and I retained it until, active membership, into 1952. Now I believe I am considered on the inactive list. [37]

Q. But all during this period of litigation you maintained a membership in the Hollywood Athletic Club?

A. Yes, the latest card I have is 1952.

Q. Were there any other clubs you belonged to in the United States? A. No.

Q. Now, in addition to any personal property which you owned when you left for Australia, did you own any real property, real estate?

A. I had this lot, building site.

Q. That was an unimproved lot? A. Yes.

Q. You stated that, I believe, it was in 1949 that you acquired your former wife's half interest from her. Was it in that lot you acquired that?

A. Yes, I acquired her half interest.

Q. You still own that? A. Yes.

Q. You held that all through this period?

A. Yes.

Q. Where was that lot located?

A. It is in San Fernando Valley, very close to Coldwater Canyon and Ventura Boulevard.

Q. You paid taxes on that lot all this time to

(Testimony of Glenn Weible.)

the County of Los Angeles, City of Los [38] Angeles?
A. Yes.

Q. And have any improvements been made on that lot?
A. No.

Q. Is and was your intention to hold that lot to eventually build a residence there?

A. I have—when it was originally acquired it was my intention to some day build a residence. Now I really don't know what I am going to do.

Q. Was it your intention, when you acquired that half interest from your former wife, so to do?

A. There again I couldn't say. My mind wasn't made up. I offered the lot to her. She didn't want to buy, so I purchased.

Q. How much did you pay for it?

A. \$7,500.00.

Q. Did you pay cash? A. No.

Q. Note or trust deed?

A. I paid by payment through a bank, monthly payments.

Q. Monthly payments? A. Yes.

Q. On a note then? A. Yes.

Q. In Canada, did you pay any Canadian income taxes?
A. No. [39]

Q. Did you pay any in England? A. No.

Q. English taxes? A. No.

Q. Now, with respect to the Australian Government, I believe you testified that you paid income taxes to the Australian Government during the last four months that you were there?
A. Yes.

Q. Now, isn't it true that in order to be ex-

(Testimony of Glenn Weible.)

empted from the payment of the taxes for the earlier years you had to make an application to the Australian Government setting forth your purposes in being in Australia as only of a temporary nature?

A. We had to make an application for—the phrasing of this application, I don't remember.

Q. Did you have to make an application in Canada and England?

A. No. We had to get a work permit in England in order to work, but I don't recall anything in England or Canada having to do with the payment of taxes. I imagine the work permit automatically exempted you from the payment of taxes if you were a foreign person in the country, working to set up operations.

Q. I show you a certified copy of the [40] application.

Mr. McHale: I would like to have this marked for identification.

The clerk: Government's A.

(The document referred to was marked Government's Exhibit A for identification.)

Q. (By Mr. McHale): I show you Government's A, which is a certified copy of the application made under the provisions of the Australian Tax Assessment Act, and ask you if you recall making that application.

A. My recollection isn't this specific one, but

(Testimony of Glenn Weible.)

undoubtedly it is because I certainly made application.

Mr McHale: I offer this as Government's first exhibit.

The Court: It hasn't been identified.

Mr. McHale: Yes, Exhibit A.

The Court: I know, but by the witness there is no foundation.

Mr. McHale: It is a certified copy and carries a certificate, your Honor, of the vice consul.

The Court: I was thinking of the equivocal way in which the witness treated it.

Hand it to the clerk, so I can see the certification. Any objection?

Mr. Moss: It doesn't seem to me that Mr. Weible recalls making one. I don't recall from looking at it, your Honor, whether it is—it is just a type-written signature on there, [41] is it not?

The Court: Yes. Of course, it purports to be a copy. There is a pen and ink signature of a Mr. McGovern, Commissioner of Taxation.

Do you want to examine it? I am wondering whether the certification is sufficient foundation for its admission.

Mr. Moss: Your Honor, the certification by the American Consul certifies that P. S. McGovern, whose true signature is ascribed to the attached document, was the tax collector. It doesn't say it was signed in his presence, and maybe we can assume it is. I have never seen this before, so I just don't know.

(Testimony of Glenn Weible.)

The Court: Well, suppose we just let it remain marked for identification and if you find that there is some basis for ruling it out you can treat that in your brief. You can treat the basis for admitting it, Mr. McHale, because, like counsel, I have never seen it before and it would appear *prima facie* that it is admissible. But I wouldn't be able, without some research, to be certain of it.

Q. (By Mr. McHale): I have the original income tax returns here, Mr. Weible, and I notice that the returns for the years 1948 and 1949 show the name of the taxpayers as Glenn Weible and Patricia Marie Weible, home address 1666 North Highland Avenue. Is that the address of Max Factor?

A. Yes. [42]

Q. The return for 1947, which appears to be a separate return, shows Glenn Weible, address 10427 Moorpark Street, North Hollywood, California. That was your residence?

A. Former address.

Q. Prior to leaving for Australia?

A. Yes.

Q. What was that, an apartment?

A. Apartment, yes.

Q. Did you own any home here in Los Angeles?

A. No.

Q. At any time? A. No.

Q. Did you have an automobile in Australia?

A. No. The company furnished an automobile; it wasn't in my name.

Q. Canada? A. No.

(Testimony of Glenn Weible.)

Q. No automobile there? A. No.

Q. How long were you here in 1948, Mr. Weible? A. Approximately three weeks.

Q. When you went to Australia for the Max Factor Company, I believe you testified you had no definite time in mind for the establishing of this factory. A. No. [43]

Q. However, you did not intend to remain there permanently, did you?

A. That would be difficult to say. We went on an indefinite assignment, and the company never proposed that I remain there permanently. At least, they never discussed it with me, to remain permanently.

Q. You intended to remain in the employment of Max Factor, is that true? A. Yes.

Q. You had no intention of leaving the employment of Max Factor and seeking other employment in Australia? A. No.

Q. The same is true in Canada? A. Yes.

Q. The same is true for England?

A. Yes.

Mr. McHale: That is all.

Redirect Examination

By Mr. Moss:

Q. Just one question, Mr. Weible.

With respect to this membership you retained in the Hollywood Athletic Club, did you pay dues to the Hollywood Athletic Club during the time you were away? A. Yes.

(Testimony of Glenn Weible.)

Q. This was until you dropped the membership in 1952? [44]

A. Became inactive. Actually, I don't recall. The last card I have was '52. I think it became inactive before that and I stopped paying dues.

Q. They sent you cards on this, notifying you when your dues were due?

A. A letter to the effect, when and if I ever came back to the United States to live, then I could pick up the membership again.

Q. That was in 1952 they told you that? I want to make sure from '46 to '52 you paid——

A. As far as I recall. I notice the last card I have was '52. It must have been '52, the last time I paid any dues.

Q. You specifically were paying dues prior to that?

A. There were two types of dues. One, if you were here and used the club, and paid a higher dues. Then if you were out of the country and didn't use the club it was a very small amount you paid monthly.

Finally I stopped paying dues altogether, with the idea of if I ever lived here again I could take up the membership.

Q. When you were away you paid the smaller amount then? A. That is right.

Q. You don't recall what that figure was with respect to the other?

A. Some four dollars a month, something like that, a [45] very small amount.

Mr. Moss: That is all.

Mr. McHale: No further questions.

The Court: They have apparently finished.

(Witness excused.)

The Court: Any other evidence?

Mr. Moss: That is all the evidence, your Honor.

Mr. McHale: All we have, your Honor, is this exhibit we offer in evidence as the Government's A.

There is one thing, the method of computation of the 1947 refund, in case that should become necessary we would need the 1947 income tax return probably in evidence.

However, I notice we have a photostatic copy—I think probably a retained copy—which I am willing to offer in evidence in lieu of the original, since I have no extra copy of the original.

Mr. Moss: That is satisfactory.

Mr. McHale: It is only for the purpose of possible computation.

The Court: It is received.

The clerk: Government's B.

(The document referred to was marked Government's Exhibit B and was received in evidence.)

Mr. Moss: I would like to make a request. I would like to withdraw the first exhibit to photostat it, in order that [46] the plaintiff could have a copy of it.

The Court: Surely. Well, let's see. That gets

into a little difficulty there. That is a document which the Government has offered. Now, it is now in the court's file. If it were one you offered I could very easily allow you to withdraw it for the purpose of photostating. Since it has come in from the other side, I can't give you that privilege with their document.

However, there is a photostat service operated by the Clerk's Office, as part of their clerical function, and they will prepare one for you.

Mr. Moss: I would just as soon arrange it that way. That would be entirely satisfactory.

The Court: You may either do it that way or get a stipulation with Mr. McHale.

Mr. Moss: I will arrange that with Mr. McHale.

The Court: How do you want to present the legal question in this case? Do you want to brief it or want to argue it?

Mr. McHale: Your Honor, may I explain my position here?

The Court: Yes.

Mr. McHale: I didn't anticipate trying this case today. As your Honor knows, I was up in Bakersfield and Fresno last week. Mr. Hochman was to try the case and was called away on an emergency.

I would appreciate a short time, not very long, to [47] prepare some kind of—

The Court: Do you want to supplement that?

Mr. Moss: I thought I would suggest the plaintiff be given a opportunity to file a supplemental brief directed to this point, and maybe one or two

other points. And then the defendant could answer them.

The Court: How long do you want? Take any reasonable time you require. I know you want to get the litigation finished. I don't want you to be working Saturday afternoon.

Mr. Moss: I have another matter that will demand my time for the next two weeks. Could I have three weeks?

The Court: Make it four, if you like.

Mr. Moss: Mr. Weible asked if it would be necessary for him to be here.

No. Three weeks will be fine.

The Court: The plaintiff's opening brief then, which will deal also with the admissibility of Government's A, will be due three weeks from this date.

How long do you want then to answer?

Mr. McHale: Two weeks is ample.

The Court: Two weeks thereafter for the defendant's brief. And if you have comment after that, I suppose you can get it in within a week.

Mr. Moss: Yes. I think we should have it pretty thoroughly briefed. [48]

The Court: One week for the plaintiff's rebuttal.

Mr. McHale: I have a pending offer as to the Exhibit A.

Will it be understood it will be admitted, subject to motion to strike, or how will you handle it?

The Court: The court will rule on the admission or rejection of the document at the time that it rules upon the main case.

Mr. McHale: Very well, your Honor.

The Court: Is that acceptable to you?

Mr. McHale: That is acceptable.

Mr. Moss: That is fine.

The Court: Anything further?

Mr. Moss: No.

Mr. McHale: That is all.

The Court: You managed to conclude your case just three minutes before the judges' meeting.

Mr. Moss: We are a little faster than we thought we would be, your Honor.

(Whereupon, at 3:30 o'clock p.m., Monday, January 9, 1956, the case was submitted.) [49]

Certificate

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of May, A.D. 1956.

/s/ VIRGINIA K. WRIGHT,
Official Reporter.

[Endorsed]: Filed May 23, 1956. [50]

DEFENDANT'S EXHIBIT A

Commonwealth of Australia

Please quote this No. in your reply.

J.67/24 Pt. 7

Federal Taxation Office

Canberra, A.C.T.

24th June, 1954.

Eldon P. King, Esq.,

Director,

International Tax Relations Division,

Bureau of National Revenue,

Washington 25, U.S.A.

Dear Mr. King:

Since I wrote to you on 2nd October, 1953, concerning Mr. Glenn Berlin Weible, I have found that it is not practicable for the Secretary of the Department of National Development to supply you with a copy of documents relating to Mr. Weible.

As the Income Tax Convention between the United States and Australia has now become effective, I am enclosing a statement relating to the Australian taxation position in respect of remuneration derived by Mr. Weible during his stay in Australia.

I trust that this statement contains the information required by you.

With kind regards,

Yours sincerely,

/s/ P. S. McGOVERN,

Commissioner of Taxation.

[Stamped]: Received June 28, 1954.

Commonwealth of Australia,
State of New South Wales,
City of Sydney,
Consulate General of the
United States of America—ss.

I, Harry J. Mullin, Jr., Vice Consul of the United States of America at Sydney, Australia, duly commissioned and qualified, do hereby certify that P. S. McGovern, whose true signature is subscribed to the attached document, was on the eleventh day of June, 1954, the day of the date thereof, Commissioner of Taxation for the Commonwealth of Australia at Canberra in the Australian Capitol Territory in the Commonwealth of Australia, duly commissioned and qualified, to whose official acts full faith and credit are due.

In Witness Whereof I have hereunto set my hand and the seal of the Consulate General of the United States of America at Sydney, Australia, this fifteenth day of June, 1954.

[Seal] /s/ HARRY J. MULLIN, JR.,
Vice Consul of the United
States of America.

Service No.:

Item No.: 38

No fee prescribed.

[Stamped]: 10559.

Commonwealth of Australia

Federal Taxation Office

Canberra, A.C.T.

Statement for Commissioner of Internal Revenue

Washington, D. C.

United States of America

This statement relates to Mr. Glenn Berlin Weible at one time living at 96 Elizabeth Bay Road, Elizabeth Bay, New South Wales, Australia.

2. Sub-paragraph (vii) of paragraph (c) of Section 23 of the Income Tax Assessment Act 1936-1946 required exemption from income tax to be granted in respect of income derived—

“as director’s fees, salary or wages by a non-resident, during a visit to Australia during which he acts as a director, manager or other administrative officer of, or is employed as a consultant, technician or operative in, a manufacturing, mercantile or mining business or a business of primary production, being income—

“(1) derived during—

“(A) the first year of the visit; or

“(B) the second year of the visit if the Secondary Industries Commission of the Department of Post-war Reconstruction certifies, and the Treasurer is satisfied, that the retention of the non-resident’s services in Australia beyond

the first year will assist or has assisted in the development of Australian industry; and

“(2) which is not exempt from income tax in the country where the non-resident is ordinarily resident.”

A corresponding exemption from social services contribution imposed by the Social Services Contribution Assessment Act 1945-1946 was also granted.

3. Mr. Weible stated that he arrived in Australia on 15th June, 1946. By reason of the provisions referred to above, he was granted exemption from income tax and social services contribution during that first year of his visit to Australia.

4. For the purposes of obtaining exemption from income tax and social services contribution during the second year of his visit to Australia, Mr. Weible completed and filed an application as follows:

Commonwealth of Australia

Income Tax Assessment Act 1936-1946: Section 23(e)(vii)

Application for Certificate from Secondary Industries Commission

(a) I (full name) Glenn B. Weible being a non-resident of Australia at present living at Flat 26, 96 Elizabeth Bay Road, Sydney, hereby make ap-

plication for a certificate to be issued by the Secondary Industries Commission under Section 23, sub-section (c), paragraph (vii) of the Income Tax Assessment Act 1936-1946.

I certify that the following information concerning me is correct to the best of my knowledge and belief.

Usual place of residence of applicant: United States of America.

Occupation of applicant: Chemical Engineer.

Name of employer or client: Max Factor & Co. (Incorporated U.S.A.). Registered in New South Wales as Foreign Company.

Address of employer or client: Sydney Branch Registered Office, 11-25 Palmer Street, East Sydney.

Nature of applicant's duties while in Australia: To train local chemists in application of formulae and manufacturing operations in formulating products.

Relevant qualifications: Graduate of University of Missouri, U.S.A. Chief Chemist (Paint and Lacquers) for Lockheed Aircraft Corporation.

Date of arrival in Australia: 15th June, 1946.

Date of departure (Anticipated): November, 1947.

Reasons for visit to Australia extending beyond twelve months: Completion of itinerary within twelve months was prevented owing to delay in obtaining imported plant and machinery, caused by

overseas shipping strikes, further delay in installation in Australia due to lack of raw materials and shortage of labour, and commencement of operations also delayed through shortage of essential materials, including containers.

Date: 2nd May, 1947.

/s/ GLENN B. WEIBLE.

Note: The above information should be as full as possible; otherwise it may not be practicable either for the Commission to issue the required certificate or for the Treasurer to be satisfied as required by the Act that the retention of the non-resident's services in Australia beyond the first year will assist or has assisted in the development of Australian industry. Where possible this application should be supported by a statement by the taxpayer's employer or client corroborating and if possible amplifying the information given by the applicant.

(a) This form should be completed by the person, who is seeking the benefit of Section 23(c)(vii). Where such person has left Australia it may be completed on his behalf by his employer or client in Australia.

5. On 7th July, 1947, the Secretary to the Secondary Industries Commission gave a certificate in the following form:

Commonwealth of Australia

Income Tax Assessment Act 1936-1946

Section 23(c)(vii)

Certificate

The Secondary Industries Commission certifies that the retention of the services of Glenn B. Weible in Australia, as Chemical Engineer employed by Max Factor & Co. (Registered in New South Wales as Foreign Company), 11-25 Palmer Street, East Sydney, New South Wales, beyond the fifteenth day of June, 1947, has assisted in the development of Australian industry.

For and with the authority of the Secondary Industries Commission.

/s/ J. L. KNOTT,
Secretary.

Dated the 7th day of July, 1947.

6. The then Treasurer was satisfied that the retention of Mr. Weible's services in Australia beyond the first year of his visit would assist in the development of Australian industry and income derived by Mr. Weible for the period from 15th June, 1947, to 14th June, 1948, was exempt from income tax and social services contribution by reason of the provisions of the law referred to above.

7. Remuneration derived by Mr. Weible in the period from 15th June, 1948, to 30th June, 1948, was regarded as income having its source in Australia

and as being assessable income. The amount of the income was insufficient to give rise to a liability for income tax or social services contribution.

8. Mr. Weible left Australia on or about 9th October, 1948, and remuneration derived by him in the period from 1st July, 1948, to 9th October, 1948, was regarded as income having its source in Australia. Exemption from Australian tax was not claimed in respect of that income, which was subjected to income tax and social services contribution.

/s/ P. S. McGOVERN,
Commissioner of Taxation.

Canberra, 11th June, 1954.

Received June 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 33, inclusive, contain the original

Complaint;

Answer; Request for Additional and for Amendments to Findings;

Findings of Fact and Conclusions of Law and Judgment;

Notice of Appeal;

Designation of Contents of Record on
Appeal;

which, together with defendant's Exhibit A and 1 volume of reporter's transcript of proceedings had on January 9, 1956, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 1st day of June, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 7, inclusive, contain the original

Plaintiffs' Supplemental Memorandum;
Supplement to Designation of Contents of
Record on Appeal;

in the above-entitled cause, which constitute the supplemental transcript of record on appeal in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$1.20, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 10th day of July, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15150. United States Court of Appeals for the Ninth Circuit. Glenn Weible and Patricia Weible, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15150

GLENN WEIBLE and PATRICIA WEIBLE,
Appellants,

vs.

UNITED STATES,
Appellee.

STATEMENT OF POINTS

I.

Statement of Points

The points upon which appellants (plaintiffs) intend to rely on appeal are:

1. The court erred in its conclusion of law (Conclusions of Law, Paragraph II) that appellant (plaintiff) Glenn Weible, was not a bona fide resident of Australia for the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

2. The court erred in its conclusion of law (Conclusions of Law, Paragraph III) that appellants (plaintiffs) Glenn Weible and Patricia Weible were not bona fide residents of Australia or Canada during the calendar year 1948 within the meaning

of Section 116 of the Internal Revenue Code of 1939, but were residents of the United States, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

3. The court erred in its conclusion of law (Conclusions of Law, Paragraph IV) that appellants (plaintiffs) Glenn Weible and Patricia Weible were not bona fide residents of Canada and England in 1949, within the meaning of Section 116 of the Internal Revenue Code of 1939, but were residents of the United States, and that therefore the earnings of Glenn Weible from Max Factor & Company for said year were taxable.

4. The court erred in Paragraph X of its Findings of Fact to the extent that it failed to find that appellant, Glenn Weible, changed his membership in the Hollywood Athletic Club to an inactive membership during the years involved.

5. The court erred in Paragraph XI of its Findings of Fact to the extent that it failed to find that pursuant to his agreement with Max Factor & Company appellant, Glenn Weible, and his employer agreed that he would remain continuously outside of the United States in the performance of his duties except for short periods of training and consultation.

6. The court erred in Paragraph XII of its Findings of Fact to the extent that it failed to find that no definite time was set by either Glenn Weible or his employer for the completion of Weible's

assignment in Australia, because they were unable to predict how long it would take, and that Weible agreed to remain in Australia until the assignment was completed.

7. The court erred in Paragraph XIV of its Findings of Fact to the extent that it failed to find that while in Sydney, Australia, Weible frequented a local club and actively entered into social life in Sydney, and that his friends and acquaintances were predominantly Australians.

8. The court erred in receiving appellee's (defendant's) Exhibit "A" into evidence; or in the alternative the court erred in Paragraph XV of its Findings of Fact to the extent of its finding that Glenn Weible secured exemptions from the Australian income tax laws by filing with the Australian government a statement that he was a non-resident of Australia, that his usual place of residence was the United States of America, and that he anticipated leaving Australia in November, 1947.

9. The court erred in Paragraph XVII of its Findings of Facts to the extent that it failed to find that no definite time was fixed by Weible or his employer for the length of his stay in Canada, but that Weible agreed to stay as long as necessary to accomplish his assignment in Canada.

10. The court erred in Paragraph XVIII of its Findings of Fact to the extent that it failed to find that during the years involved Weible intended to

remain abroad for an indefinite period in the foreign service of Max Factor & Company.

Dated: June 15, 1956.

THOMPSON, ROYSTON,
WIENER & MOSS,

By /s/ CONRAD J. MOSS,
Attorney for Appellants and
Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1956.

No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANTS.

THOMPSON, ROYSTON, WIENER & MOSS,

ROBERT S. THOMPSON,

CLIFFORD E. ROYSTON,

CONRAD J. MOSS,

433 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellants.

FILED

SEP 15 1966

PAUL P. O'BRIEN, CLERK



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No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF OF APPELLANTS.

Jurisdiction.

This is an action for refund of income taxes paid by appellant Glenn Weible for the calendar year 1947 and by appellants Glenn and Patricia Weible for the calendar years 1948 and 1949. Jurisdiction of the District Court was invoked under 28 U. S. C. Sections 1340 and 1346 on the ground that this cause arises under the 1939 Internal Revenue Code Sections 322 and 3772 (1954 Internal Revenue Code Sections 6402, 6532 and 7422). [R. 3, 20].

On March 15, 1948, appellant Glenn Weible and on March 15, 1949, and March 15, 1950, appellants Glenn and Patricia Weible filed with the Collector of Internal Revenue for the Sixth District of California Federal

Individual Income Tax Returns for the calendar taxable years 1947, 1948 and 1949 respectively and paid Federal income taxes for those years in the amounts of \$1,320.13, \$983.96 and \$1,305.70 respectively. Claims for refund were filed with the Collector of Internal Revenue for the Sixth District of California within three years from the time said returns were filed, namely on January 31, 1951, in the amount of \$696.13 for the year 1947, \$983.96 for the year 1948 and \$1,305.70 for the year 1949. All of said claims were disallowed by the Collector of Internal Revenue by notices dated March 27, 1952. All of the above jurisdictional facts were alleged in the complaint, admitted in the answer and included in the findings of fact of the District Court [R. 3, 4, 6, 9, 10, 12-24, 31-33]. This action was filed within two years from the date of disallowance of said claims, namely on July 14, 1953 [R. 19]. Judgment was entered April 6, 1956 [R. 40]. Notice of Appeal was filed May 9, 1956 [R. 44]. This Court has jurisdiction under 28 U. S. C. Sec. 1291.

Statement of the Case.

Question Presented.

The only question presented is whether appellants were bona fide residents of a foreign country or countries during the taxable years 1947, 1948 and 1949 within the meaning of Section 116 (a) (1) of the Internal Revenue Code of 1939 and thus entitled to the income tax exemption provided by that section.

Statutes and Regulations Involved.

1939 Internal Revenue Code Section 116 (a) (1) and Treasury Regulations 111, Sections 29.116-1, and 29.211-2 are set forth in the Appendix, *infra*, pages 1-3.

Evidence.

The case was tried upon the pleadings and exhibits attached thereto [R. 3-25], the testimony of two witnesses, Michael Harris, Vice President in charge of the export division of Max Factor and Co., the employer of appellant Glenn Weible [R. 48-58] and Glenn Weible, one of the appellants [R. 59-85] and defendant's Exhibits A and B [R. 85, 89-96].

The pleadings show that appellant Glenn Weible is a citizen of the United States [R. 4, 20].

The testimony of Michael Harris and Glenn Weible shows that Glenn Weible was employed by Max Factor & Company (Factor), a cosmetics manufacturer, from 1938 to 1941 as a cosmetic chemist. During the war he was employed by Lockheed Aircraft Company [R. 59, 60]. After the war Factor determined to modify its method of foreign operations by converting its foreign branches from distributors of Factor products imported from the United States to manufacturing operations within the foreign countries themselves. In 1945, by reason of his special knowledge of the company's operations and his abilities, Weible was re-employed for the specific task of planning, organizing and supervising the establishment of manufacturing plants for the company in foreign countries [R. 49, 61]. Weible entered into an employment agreement with Factor whereby he agreed to undertake these duties and to remain permanently outside the United States in the performance of his duties except for short periods of training and consultation [R. 50-51, 61-62].

From January until May, 1946, Weible was employed in Mexico in expanding Factor's operation there. Then in June, 1946, Weible was sent by his employer to Syd-

ney, Australia, for the purpose of establishing for the first time a manufacturing plant in that country. No definite period was set by either Weible or his employer for the completion of that project since at the time they were unable to tell how long it would take. Weible had to arrange for a physical plant, procure local sources of supply for the company's product, train personnel to run the operation and supervise the new plant until such time as the local staff could run it independently [R. 51-52, 63-65].

In Australia Weible leased an apartment, purchased his own food and generally provided for his own needs. He frequented a local social and turf club and fully entered into the social life of Sydney. His friends and associates were predominantly Australians [R. 67-69].

When he departed for Australia, Weible's first wife was regularly employed in a responsible position with a motion picture studio and she remained behind with the intention of joining him after he became settled in Australia. However, in September, 1947, she obtained an interlocutory decree of divorce. Pursuant to that decree she was given all of the family home furnishings and other personal effects, and from that time to the present Weible has maintained no home of any kind in the United States. As part of the settlement with his wife Weible purchased her interest in a vacant lot in Los Angeles. He also retained a bank account in that city [R. 65-67].

Australia allowed an exemption from income tax to foreign citizens for two years, but after the expiration of the exemption period, Weible paid income tax to Australia on his salary from Factor [R. 69-70].

Weible was recalled to the United States by Factor in October, 1948, for the purpose of proceeding to

Canada to establish a manufacturing plant for the company there. He returned with his second wife, Patricia, an Australian citizen whom he married in the United States, and after a two week stay in the United States, went to Toronto on his assignment. He and his wife rented an apartment and set up housekeeping. As in Australia, they made all of their own personal arrangements and their social contacts were among Canadians. No definite time was fixed on Weible's stay in Canada but he agreed to remain as long as necessary to accomplish his assignment which by its nature was indefinite as to duration [R. 52-53, 70-73].

A reorganization in the British branch of Factor in June, 1949, required the company to order Weible directly to England in July, 1949, to assist in the training of supervisory and factory personnel in the methods and procedures for the manufacture of its products. Weible agreed to remain in England until this assignment was completed. At that time neither Weible nor his employer could predict how long that would be. Weible remained continuously at the British branch until December, 1950, when he was called back to the United States, and after a two month retraining and review of new techniques, was sent to South America, where he resided at the time of the trial herein on January 9, 1956 [R. 54-55, 73-76].

While in England, the Weibles made their own living arrangements and entered into the social life of the community. They were regular visitors of an English yacht club and they purchased an English automobile [R. 74-76].

All the income involved in the claims for refund in this action are attributable to the earnings of Glenn Weible for personal services rendered to Factor [R. 35-36].

During the years in question, Factor withheld tax from Weible's wages. An officer of that company, as attorney for the taxpayers, filed Federal income tax returns on their behalf for the years 1947, 1948 and 1949 reporting as taxable income the salary paid to Weible.

The government offered in evidence a document purporting to be an application made by Glenn Weible under the provisions of the Australian Tax Assessment Act. Appellant entered an objection on the ground that the certification on the document was insufficient foundation for its admission, which ground of objection was amplified by leave of the District Court [R. 82] in Plaintiff's Supplemental Memorandum [R. 26-30]. The District Court did not rule specifically on the admission of this evidence [R. 87] but inferentially ruled it admissible by paragraph XV of its Findings of Fact relating to the contents of Government's A [R. 36].

Findings, Conclusions and Judgment.

Findings of fact, conclusions of law and judgment were entered on April 6, 1956 [R. 40]. The Court concluded that appellant Glenn Weible was not a bona fide resident of Australia for the calendar year 1947, that appellants Glenn Weible and Patricia Weible were not bona fide residents of Australia and Canada during the calendar year 1948, and that the appellants were not bona fide residents of Canada and England during the calendar year 1949 within the meaning of Section 116 of the Internal Revenue Code of 1939, and that therefore the earnings of Glenn Weible from Factor were taxable [R. 39]. The judgment ordered that the appellants take nothing by their complaint [R. 40].

Specification of Errors.

1. The Court erred in failing to find that pursuant to his agreement with his employer and during the years 1947, 1948 and 1949 Weible agreed to and intended to remain continuously and indefinitely in a foreign country or countries in the performance of his duties except for short periods of training and consultation.

2. The Court erred in failing to find that the purpose of Weible in going to Australia, Canada and England was of such a nature that an extended stay in those countries may have been necessary for its accomplishment.

3. The Court erred in concluding that appellant Glenn Weible was not a bona fide resident of Australia during the calendar year 1947 within the meaning of Section 116 of the Internal Revenue Code of 1939.

4. The Court erred in concluding that appellants were not bona fide residents of Australia and Canada during the calendar year 1948 within the meaning of Section 116 of the Internal Revenue Code of 1939.

5. The Court erred in concluding that appellants were not bona fide residents of Canada and England during the calendar year 1949 within the meaning of Section 116 of the Internal Revenue Code of 1939.

Summary of Argument.

1. The conclusion of the District Court, that appellants were not bona fide residents of a foreign country or countries within the exemption afforded by Section 116 (a) (1) of the Internal Revenue Code of 1939, is a conclusion of law, and as such may be reviewed by this Court on the basis of the entire record in the case.

2. It was the intent of Congress in enacting the 1942 amendment to Section 116 to exempt from taxation the income of citizens who were engaged in foreign trade and who while living abroad became assimilated into the foreign community where they lived. The appellants are in that class of citizens to whom the exemption provided by Section 116 was intended to apply.

3. The Treasury Regulations implementing Section 116 provide that an intent to remain abroad indefinitely on a project which by its nature may require an extended stay abroad for its completion constitutes a person a bona fide resident of foreign countries within the meaning of Section 116. Appellant Glenn Weible intended to remain indefinitely in the foreign service of his employer and when he had completed one foreign assignment to proceed to the next. He in fact carried out his intention from 1946 when he undertook his first foreign assignment through January 9, 1956 the date of trial herein. At all times during the taxable years involved appellants were bona fide residents of foreign countries and so entitled to the exemption provided in Section 116.

4. The Court decisions interpreting Section 116 and the related Treasury Regulations support the position of appellants. Appellants have found no case involving a career foreign service employee that reaches a contrary result. *Downs v. Commissioner* (C. C. A.-9, 1948), 166 F. 2d 504, cert. den. 334 U. S. 832, and similar cases are distinguishable on the ground that the taxpayers there involved went abroad on a government or construction project for a period of limited duration, retained their domestic residences and in no way entered into the life of or assumed the expenses of living in the foreign community where they lived.

I.

The Conclusion of the District Court That Appellants Were Not Bona Fide Residents of a Foreign Country or Countries During the Taxable Years Involved Should Be Set Aside by This Court After Review of the Entire Record.

The conclusion that a taxpayer is a bona fide resident of a foreign country or countries within the meaning of Section 116 of the Internal Revenue Code of 1939, is a conclusion of law and as such is subject to judicial review unlimited by the "clearly erroneous" rule governing review of findings of fact. *Commissioner v. Fiske* (C. C. A.-7, 1942), 128 F. 2d 487, cert. den. 317 U. S. 635. Where, as in the present case, the facts were not in dispute, the Circuit Courts of Appeals have reviewed the conclusions of the trial court in the light of the entire record and where such conclusion was erroneous have set it aside. *Svenson v. Thomas* (C. C. A.-5, 1947), 164 F. 2d 783; *Seeley v. Commissioner* (C. C. A.-2, 1951), 186 F. 2d 541; *Myers v. Commissioner* (C. C. A.-4, 1950), 180 F. 2d 969. This Court, therefore, may determine this appeal on the basis of the entire record unrestricted by the findings of fact and conclusions of law of the District Court.

II.

Appellant Glenn Weible Was a Bona Fide Resident of Australia in 1947 and Both Appellants Were Bona Fide Residents of Australia, Canada and England in 1948 and 1949 and Therefore Exempt From Income Tax in Those Years Under the Provisions of Section 116 (a) (1) of the Internal Revenue Code of 1939.

Section 116 (a) (1) of the 1939 Internal Revenue Code exempts from income tax earned income of citizens of the United States from sources without the United States who are bona fide residents of a foreign country or countries during the taxable year.

Appellant Glenn Weible is a citizen of the United States [R. 4, 20] and the income on which the taxes herein sought to be refunded were paid consisted of earned income from sources without the United States as that phrase is used in Section 116 (3) [R. 35-36] (Reg. 111, Sec. 29.116-1, Appen., *supra*) and therefore the only question before the Court is whether appellants were bona fide residents of Australia, Canada and England in the taxable years involved.

A. Section 116(a) Was Intended by Congress to Exempt From Tax the Income of Taxpayers in the Category of Appellants.

The exemption granted by Section 116 (a) was first extended to a person who was a “bona fide nonresident” of the United States for more than six months during the taxable year (Revenue Act of 1926, c. 27, 44 Stat. 9). The exemption thus provided was intended to encourage foreign trade. *Downs v. Commissioner* (C. C. A.-9, 1948), 166 F. 2d 504, 507. Mere physical absence from the country for six months was sufficient to qualify for

the exemption, *Commissioner v. Fiske, supra*, and in practice the exemption resulted in discrimination in favor of persons receiving compensation from nongovernmental sources (H. R. No. 2333, 77th Cong., 1st Sess., p. 93, 1942-2 Cum. Bull., 372, 412). To correct this abuse in 1942 the exemption was limited to persons who were bona fide residents of a foreign country or countries during the taxable year. The Senate Committee on Finance reported that it had formulated the limited exemption because it had been convinced by cases brought to its attention that complete elimination of the exemption would work a hardship on United States citizens who were bona fide residents of foreign countries, and who for that reason were confronted with higher living costs than those of domestic residents (Senate Report 1631, 77th Cong., 2d Sess., 1942-2 C. B. 504, 548).

A citizen who had established a home abroad in order to compete in foreign markets was found in the Senate Committee hearings to be confronted with expenses uncommon to residents of the United States (Hearings on the Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, pp. 733-775).

“The Committee sought to embrace in the term ‘bona fide resident’ all whose assimilation into the foreign life was sufficient to expose them to the burdens of adjusting to the foreign environment.” (Goodman, District Judge, *Meals v. United States* (1953, D. C. N. D. Calif), 110 Fed. Supp. 658, 661.)

The inclusion of the words “or countries” in the language of Section 116 (a) (1) indicates the intent of Congress to include within the exemption those persons whose work abroad might take them to several countries during the course of the taxable year.

Glenn Weible was employed for the specific and exclusive purpose of serving in the foreign department of an American company engaged in foreign trade [R. 49-51, 61-62]. Under the terms of his employment agreement he agreed to remain permanently on foreign assignment [R. 50, 61], and in fact he remained outside the United States in the performance of his duties for Factor from 1946 through the date of the trial of this action in January, 1956 [R. 76]. Appellants established a home in each of the foreign countries where they lived, and lived on the economy of those countries. They leased apartments, shopped for their food and other needs in local stores, attended local clubs, entertained and were entertained by local people, paid local taxes when required [R. 69-70] and completely assimilated themselves in the life of the foreign country in which they found themselves [R. 67-69, 71-72, 73-75].

By reason of the purpose of their presence abroad and the manner in which they conducted their lives in the foreign countries where they resided appellants were in that class of citizens which Congress intended to exempt from income tax when in 1942 it amended Section 116 (a) to exempt from taxation the income of citizens who were bona fide residents of a foreign country or countries during the taxable year.

B. During the Taxable Years Appellants Intended to Live Abroad for an Extended and Indefinite Period of Time, and Therefore Were Bona Fide Residents of a Foreign Country or Countries Under the Criteria Set Forth in the Treasury Regulations.

The statute does not define the term "bona fide resident" and therefore the Treasury Regulations are especially authoritative because they serve to implement a

purpose not set forth in detail. *Seeley v. Commissioner*, 186 F. 2d 541, 543. Treasury Regulation 111, Section 29.116-1, in effect during the years in question provided,

“Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.”

Section 29.211-2 declares that a person's intentions determine whether he is a “resident” and that one who is present without any “definite intention as to his stay” is a resident. When an extended stay may be necessary to accomplish his purpose “he becomes a resident” if he makes his home “temporarily” where he has gone, though it may be his intention all the time “to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.”

“Residence” as so defined has a completely different meaning than “domicile,” *Downs v. Commissioner*, 166 F. 2d 504, 507, and therefore the findings of the District Court that appellants did not intend to live permanently in Australia, Canada or England [Findings of Fact XX, R. 38] are irrelevant to the issue of this case.

Appellant Glen Weible was employed with the specific understanding that he would work exclusively in the foreign department of Factor. When one foreign assignment was completed he was to proceed to the next, returning to the United States only for brief periods of training and vacation [R. 50, 62]. He was sent abroad to establish manufacturing plants in various foreign countries where none had previously existed [R. 49-50,

61]. This project was a complicated one, requiring the establishment of many contacts in the foreign country, the training of foreign personnel in the special techniques of the company and the supervision of the new operation until the foreign personnel could be safely left on their own. No definite time could be fixed for the completion of such a complicated project, and in fact none was. By its very nature Weible's mission abroad was one that required an extended length of time to accomplish [R. 51-55, 61-65, 71, 73-76]. Both Weible and his employer intended that he remain abroad for that indefinite period, and in fact since he entered the foreign service of Factor he has returned to the United States for brief visits on only four occasions up to the trial of this action in January, 1956 [R. 63, 70, 76]. It is difficult to imagine a citizen who by his intentions and actions more accurately fits the definition in the Treasury Regulations of a bona fide resident of a foreign country or countries.

C. The Courts Have Consistently Applied Section 116 in Favor of Taxpayers Who, Like Appellants, Have Demonstrated an Intention to Remain Abroad Indefinitely in Employment Abroad.

Glenn Weible has demonstrated by his actions that his intent to remain in the foreign service of Factor was bona fide. Under similar facts the courts have consistently concluded that the income of the taxpayer was exempt from taxation under Section 116.

The case of *Meals v. United States* (D. C. N. D. Cal. 1953), 110 Fed. Supp. 658, is strikingly similar to the present case on its facts. There the taxpayer went to Germany in December, 1945, as an employee of American Telephone and Telegraph Company. The duration of his stay was to be indefinite. His duties were to train

personnel and establish communications plants. He rented an apartment from the United States Army and entered the social life of his community. In June, 1947, he married a German girl and because of Army regulations then left Germany. He paid no income tax to Germany and enjoyed Army commissary and Post Exchange privileges. The Court concluded he was a bona fide resident of Germany during 1946, stating (110 Fed. Supp. 662):

“The whole pattern of plaintiff’s life in Germany is consistent with his claim of residence there. He went to Germany planning to remain there for a substantial and indefinite period of time. He was embarking upon employment which promised to develop into a career. He abandoned entirely the home he had previously maintained in the United States. . . . He worked with German personnel and entered into the social life of the community to such an extent that he married a German girl.”

Except for the geographical variation those words could have been written about appellant Glenn Weible.

In *White v. Hofferbert* (U. S. D. C. Md., 1950), 88 Fed. Supp. 457, the taxpayer was employed in the foreign service of International Telephone and Telegraph Company for an indefinite period in an executive capacity. He was assigned to Sweden from December, 1942, to February, 1944, when he was sent to Spain where he remained through 1946. During the years 1944 and 1945 he was called back to the United States for consultations and was physically present in the United States for a six months’ period in each of those years. He paid no income tax to Sweden or Spain. He was held to have been a bona fide resident of Sweden and Spain during the years 1943, 1944 and 1945. The Court gave the con-

trolling reason for its conclusion at 88 Fed. Supp. 460 where it said:

“His original engagement as a foreign service officer of the I. T. & T. in November, 1942, was for an *indefinite period*, and it is entirely reasonable to find that his intention was to remain in the foreign service of that Company as a career or at least for many years.”

See also:

Seeley v. Commissioner, supra;

Swenson v. Thomas (C. C. A. 5, 1947), 164 F. 2d 783;

Larsen, 23 T. C. 599;

Stierhout, 24 T. C. No. 54;

Glackin v. Commissioner (D. C. S. D. Ill., 1952), 10 Fed. Supp. 372;

Pierce, 22 T. C. 493, acq. Int. Rev. Bull., 1954 C. B. 5;

Hamer, 22 T. C. 343;

Rose, 16 T. C. 232;

Bachre, 15 T. C. 236;

Dickinson, T. C. Memo. Dec. 20, 851 (M)1955.

The cases in which the taxpayers have been held not entitled to exemption from income tax as bona fide foreign residents are clearly distinguishable from the present one for the reason that they all involve American technicians working temporarily abroad in war work or construction projects. In these cases the taxpayers intended to return to the United States upon completion of their contracts of employment on a specific project, they generally retained their domestic residences, their living needs while

abroad were furnished by their employers and consequently they did not live on the economy of the foreign country, or identify themselves with the customs or the community life of the foreign country.

See for example:

Downs v. Commissioner, supra;

Johnson, 7 T. C. 1040;

Brown, 12 T. C. M. 1172;

Hertig, 19 T. C. 109.

The entire record in this case shows a clear intent by appellants to remain abroad for an indefinite period. This conclusion is not weakened by the fact that they maintained a bank account in the United States, *Meals v. United States, supra*; *Hamer, supra*; *Pierce, supra*, or the fact that they paid no income taxes to Canada or England, *White v. Hofferbert, supra*; *Rose, supra*.

Nor is it material to the issue of this case that Weible executed an application for certificate from the Secondary Industries Commission of Australia as set forth in Defendant's Exhibit A [R. 89-96]. The statutory meaning of the terms "resident" and "non-resident" derive their meaning from the context in which they are used. *Downs v. Commissioner*, 166 F. 2d 504, 507, 508. The fact that Weible applied for and obtained exemption from Australian income tax has no significance in determining whether he was a "bona fide resident" there as that term is used in Section 116 (a) (1) of the United States Internal Revenue Code of 1939.

The exemption of the earnings of a citizen resident in a foreign country from income taxation was not motivated by the desire to eliminate the possibility of a double tax on the same income since another provi-

sion of the Internal Revenue Code specifically allows as a credit against income tax due the United States, income tax paid to a foreign country. Section 131 (a) (1), Internal Revenue Code of 1939. The Congressional Committee was aware that some foreign countries levy income taxes and others do not and that in many foreign countries a much greater proportion of total taxation is represented by various indirect taxes borne by persons living there than in the United States. Hearings of the Senate Committee on Finance on H. R. 7378, 77th Congress, 2d Sess., Vol. 1, pages 745, 746, 749, 752, 757, 775. *Meals v. United States*, 110 Fed. Supp. 658, 662. Weible's intent to remain in Australia for an indefinite period of time until his work there was completed is clear from the record [R. 50, 52, 62, 63]. The completion in the application of the item "Date of Departure (anticipated)" as November, 1947, was no declaration of a contrary intent, but only a best guess as to when the job would be done. The record is also clear that Weible intended when his Australian assignment was done to proceed to the next foreign assignment, so that for the entire year he must have been a bona fide resident of foreign countries under Section 116 regardless of his status as a resident under Australian law.

Conclusion.

The decision of the District Court is contrary to the intent of Congress, the letter and spirit of the Treasury regulations and the decisions of the Courts in both this circuit and elsewhere and should be reversed.

Respectfully submitted,

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APPENDIX.

INTERNAL REVENUE CODE:

Sec. 116 (as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)). EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(3) DEFINITION OF EARNED INCOME.—For the purposes of this subsection, “earned income” means wages, salaries, professional fees, and other amounts received as compensation for personal services actually rendered, but does not include that part of the compensation derived by the taxpayer for personal services rendered by him to a corporation which represents a distribution of earnings or profits rather than a reasonable allowance as compensation for the personal services actually rendered. In the

case of a taxpayer engaged in a trade or business in which both personal services and capital are material income producing factors, under regulations prescribed by the Commissioner with the approval of the Secretary, a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 20 per centum of his share of the net profits of such trade or business, shall be considered as earned income.

TREASURY REGULATIONS 111, PROMULGATED UNDER THE
INTERNAL REVENUE CODE:

Sec. 29.116-1. EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES. For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country.

Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * * * *

Sec. 29.211-2. DEFINITION.—A “nonresident alien individual” means an individual—

- (a) Whose resident is not within the United States; and
- (b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.



No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court wrote no opinion. Its findings of fact and conclusions of law [R. 30-40] are not reported.

Jurisdiction.

This appeal involves federal income taxes. The taxes in dispute were paid as follows: \$696.13 on March 15, 1948 [R. 31-32]; \$983.96 on March 15, 1949 [R. 32]; \$1,305.70 on March 15, 1950. [R. 32.] Claims for refund were filed on January 31, 1951, and were rejected on March 27, 1952. [R. 31-33.] Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 14, 1953, the taxpayer brought an

action in the District Court for recovery of the taxes paid. [R. 32-33.] Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1340 and 1346. The judgment was entered on April 6, 1956. [R. 40.] Within sixty days and on May 8, 1956, a notice of appeal was filed. [R. 44.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court erred in finding that the evidence did not support the taxpayer's contention that he was a bona fide resident of various foreign countries during the taxable years in question, within the meaning of Section 116(a), Internal Revenue Code of 1939.

Statute Involved.

Internal Revenue Code of 1939:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [As amended by Section 148(a), Revenue Act of 1942, c. 616, 56 Stat. 798, and Section 107(b), Revenue Act of 1943, c. 63, 58 Stat. 21] *Earned Income From Sources Without the United States.*—

(1) *Foreign resident for entire taxable year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts constitute

earned income as defined in paragraph (3); but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * * * *

(26 U. S. C. 1952 ed., Sec. 116.)

Statement.

The facts as set forth in the District Court's finding of facts may be summarized as follows:¹

In this action the taxpayers seek refund of income taxes paid for the years 1947, 1948, and 1949. [R. 31-33.] The contention in the taxpayer-husband's claim for refund for 1947 and in the joint claim of the husband and wife for 1948 and 1949 is that the income upon which the taxes were computed was exempt from taxation under Section 116 of the Internal Revenue Code of 1939.² [R. 33.]

All the income involved in the claims for refund in this action is attributable to the earnings of the taxpayer, Glenn Weible, for personal service rendered Max Factor and Company and was paid to the taxpayer by deposit to his bank account in Los Angeles, California. [R. 35-36.]

¹Trial was before the District Judge, sitting without a jury. Findings of Fact were based upon the oral testimony of the two witnesses, the taxpayer Glenn Weible and Mr. Michael Harris, and upon documentary evidence presented.

²References to "Code" or "Internal Revenue Code" refer to the Internal Revenue Code of 1939 unless otherwise noted.

In September, 1945, the taxpayer, Glenn Weible,³ a chemical engineer, entered into employment with Max Factor and Company, a domestic corporation engaged in the manufacture of cosmetic products, as its representative to train personnel in its foreign branches and to organize and supervise the establishment in foreign countries of cosmetic manufacturing plants for the corporation. [R. 33.]

The taxpayer was employed by Michael Harris, a vice-president of Max Factor and Company in charge of the export division. There was no written contract or written memorandum of contract entered into between the taxpayer and his employer. The nature of the employment upon which the taxpayer was to embark was to be in connection with the expansion overseas of the manufacturing operations of the company. In 1945 and 1946, the company had plans to establish manufacturing plants in Australia and the Far East. The taxpayer was to be sent to a particular foreign place to set up a factory, to train citizens of the particular foreign country in the company manufacturing processes, and to leave when the operation was running smoothly with the citizens in charge. No particular length of time was fixed for his sojourn in any of the countries to which he was to be sent. [R. 34-35.]

Before the taxpayer commenced his overseas assignment he took in 1945 and 1946 a short refresher course in the California plant of the company. [R. 33.] Early in 1946 the taxpayer and his then wife, Jean Burt Weible,

³Since all income involved in this action is attributable to the taxpayer-husband, future references to the "taxpayer" refer to the taxpayer-husband, Glenn Weible.

spent two or three months in Mexico. They maintained an apartment in California and owned household goods and an automobile. They also jointly owned an unimproved residential lot located in Los Angeles. The taxpayer maintained a membership in a private club, the Hollywood Athletic Club, during all the years involved. [R. 34.]

Prior to the taxpayer's departure for Australia the taxpayer and his then wife decided that she would not accompany him to Australia, but would maintain the apartment in North Hollywood and join him later. They had no children. [R. 34.] Before leaving the United States the taxpayer sold his automobile and left his household goods with his wife. [R. 35.]

The taxpayer traveled to Sydney, Australia, in June of 1946, as part of the Max Factor team of key employees to assist in setting up a manufacturing branch there. During 1946 his wife wrote him from Los Angeles that she desired a divorce, and this was obtained in 1947. In connection with the divorce, the taxpayer purchased from his wife for \$7,500 her joint interest in the unimproved residential lot located in Los Angeles, California. During all the years involved in the litigation, the taxpayer continued to make substantial payments on the trust deed encumbering the property. [R. 35.]

While in Sydney, the taxpayer rented a furnished apartment on a one-year lease, and bought such necessary items as bedding and mattresses, kitchen utensils and china. He employed a housekeeper. [R. 36.]

The taxpayer secured exemption from the Australian income tax laws by filing with the Australian government a statement that he was a nonresident of Australia; that

his usual place of residence was the United States of America and that he anticipated leaving Australia in November of 1947. Because the Australian operation took longer than anticipated, the taxpayer actually stayed in Australia until October of 1948. From the period following June 15, 1948, he was not regarded as exempt from Australian taxes by the Australian government. However, his income for the period June 15 to June 30, 1948, was not large enough to subject him to the tax, and only the income from July 1, 1948, to October 9, 1948, was subjected to Australian taxes. [R. 36.]

During his stay in Australia the taxpayer met and became engaged to Patricia. At the conclusion of the Australian venture and after the manufacturing plant was manned by the Australian personnel, the taxpayer returned to the United States in October, 1948, for a two-weeks' stay. While there he married his present wife, the appellant Patricia Weible, his divorce having become final. [R. 36-37.]

The taxpayer was then sent to Toronto, Canada, by the company to set up a manufacturing establishment for a new product and container which had never been manufactured in Canada. He and his wife rented a furnished apartment in Toronto, and remained there until June of 1949 when the company ordered him to England to assist in the training and supervision of factory personnel in that country. The taxpayers remained continuously at the English branch until December, 1950, when he was called back to the United States for two months' training before being sent on an assignment to South America. [R. 37.]

The taxpayer entered into his employment with the intention of setting up manufacturing branches wherever

the company would send him, whether Australia, the Far East or elsewhere. He never, during the years involved, had the intention of becoming a permanent resident of either Australia, Canada, England or any other particular foreign country. During the years in question the taxpayers did not establish permanent homes in any of the countries in which they sojourned. They did not buy or establish a permanent residence or home in any of the countries. It was the intent of the taxpayer throughout the period to remain an employee of Max Factor and Company and he never had an intent to remain in any of the countries in which he sojourned other than as an employee of Max Factor and Company. He never intended to leave the company's employment and seek permanent employment in any of the countries in which he sojourned. By its very nature, his tour of duty in a foreign country for the company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country. [R. 37-38.]

During the year 1947, the taxpayer Glenn Weible, and during the years 1948 and 1949, Glenn and Patricia Weible, were residents of the United States of America. [R. 38.]

Based upon the above findings of fact, the District Court held that the taxpayer husband was not a bona fide resident of Australia in 1947; that the taxpayer and his wife were not bona fide residents of Australia or Canada during 1948; and that they were not bona fide residents of Canada and England during 1949. It was therefore held that the earnings of the taxpayer for the years in question were taxable, and judgment was entered in favor of the Government. [R. 39-40.] It is from this decision that the taxpayers appeal. [R. 44.]

Summary of Argument.

It is the contention of the taxpayer that he is entitled to a refund of his taxes paid for the years 1947, 1948 and 1949 because these taxes were computed on income which was allegedly exempt from taxation under the provisions of Section 116(a) of the Internal Revenue Code of 1939. That section excludes from gross income certain income of "an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The sole question at issue is whether this taxpayer was a bona fide resident of a foreign country or countries. The District Court held that he was not, and it is the position of the Government that this holding is well supported by the evidence presented.

At one time, the test for exemption was nonresidency in the United States, rather than the bona fide residency in a foreign country which is the present requirement. An analysis of the testimony and arguments presented by the taxpayer shows that he has directed his case towards proving nonresidency in the United States (the old requirement) and that he has failed to show a bona fide residency in any particular foreign country (the applicable requirement). The taxpayer has stressed the point that it was his intention to remain in foreign service, *i.e.*, not residing in the United States, rather than showing that he intended to become a resident of Australia, Canada or England. The findings of fact and the testimony of the taxpayer were to the effect that it was not the intent of the taxpayer to remain in any of the foreign countries which he visited for an indefinite period. Under

the terms of his employment he was to set up a manufacturing branch of his company in any given country and then to leave when the operation was running smoothly with nationals of the country in charge. While no particular length of time was fixed for the sojourn of the taxpayer in any particular country, it was understood at all times that his stay was to be only of a temporary nature. That the taxpayer so understood his residency is evident from the application he filed with the Australian government for the purpose of obtaining exemption from income tax and social services contribution. In this certificate the taxpayer stated that he was a nonresident of Australia. Other points of evidence convinced the District Court that the taxpayer was not a bona fide resident of a foreign country. He maintained a bank account in the United States, and his salary was deposited therein. He rented furnished apartments in both Australia and Canada, rather than a residence of more permanent nature. He maintained his membership in a private club in the United States. He owned an unimproved residential lot in Los Angeles and during all the years in question made substantial payments on the trust deed encumbering the property. He married his second wife in the United States although he met her in Australia. These facts, taken together, presented clear grounds for the District Court finding that the taxpayer was not a bona fide resident of any foreign country. This holding was supported by substantial evidence and is not clearly erroneous. Therefore it is submitted that the decision of the court below should be affirmed by this Court.

ARGUMENT.

The Taxpayer Was Not a Bona Fide Resident of Any Foreign Country During 1947, 1948 or 1949.

It is the contention of the taxpayer that he is entitled to a refund of his taxes paid for the years 1947, 1948 and 1949 because these taxes were computed on income which was allegedly exempt from taxation under the provisions of Section 116 of the Code, *supra*. Section 116 excludes from gross income—

(a) *Earned Income From Sources Without the United States.*—

(1) *Foreign resident for entire taxable year.*—
In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States * * *

The only point at issue before the Court in this appeal is whether the taxpayer was a bona fide resident of a foreign country or countries during the taxable years in question. The District Court held that the taxpayer was not a bona fide resident of any of the foreign countries in which he was situated during the taxable years, and it is the position of the Government that this holding is well supported by the evidence presented.

While the exemption statute, as applicable in the case at bar, now concerns itself with citizens of the United States who are bona fide residents of a foreign country or countries, such was not always the case. At one time, the test for exemption was nonresidency in the United States, rather than a bona fide residency in a foreign

country. This Court, in *Downs v. Commissioner*, 166 F. 2d 504, 507-508, certiorari denied, 334 U. S. 832, discussed the legislative history of the exemption as follows:

Prior to the amendment in 1942, the law exempted from tax the gross income of an individual citizen of the United States, who was a bona fide *non-resident* of the United States for more than six months during the taxable year. The purpose of the statute was to stimulate foreign trade, and to relieve United States citizens, resident in foreign countries, for periods of more than six months of the taxable year from taxation on income earned in the foreign country. The phrase "bona fide non-resident of the United States," as used in the statute, has been interpreted as including any American citizen *actually outside the United States* for more than six months during the taxable year. See *Commissioner of Internal Revenue v. Fiske's Estate*, 7 Cir., 128 F. 2d 487, certiorari denied 317 U. S. 635, 63 S. Ct. 63, 87 L. Ed. 512.

In 1942, a change in the statute reversed the situation, and, instead of exempting taxes because the citizen was a "non-resident" for half of the tax year, it exempted the citizen from the tax when he could satisfy the commissioner that he was a bona fide *resident* of a foreign country or countries during the entire tax year.

The history of Section 116(a) appears particularly pertinent to this case since an analysis of the testimony of the taxpayer and the arguments which he advances on appeal shows that he has directed his case towards proving nonresidency in the United States, and that he has failed

completely to show that he was a bona fide resident of any particular foreign country or countries. Irrespective of whether or not the taxpayer might be entitled to the tax exemption if the statute were in its pre-1942 state, it was clear to the Commissioner and to the District Court that he did not fulfil the prerequisites of the statute in its amended form. Now the determining factor is a showing of bona fide residency in a foreign country; and, as the legislative statements indicate,⁴ residence means the maintenance of a real home establishment for a long period of time by a resident who assumes the obligations of a home in a foreign country. And it is so well settled as to be almost trite to state that the burden of proving the applicability of an exemption statute must be shouldered by the taxpayer. In *Jones v. Kyle*, 190 F. 2d 353 (C. A. 10th), certiorari denied, 342 U. S. 886, the court stated:

A taxpayer asserting exemption from income tax must be able to point to an applicable statute granting the exemption and bring himself clearly within its terms. And a provision granting a special exemption

⁴See S. Rep. No. 1631, 77th Cong., 2d Sess., p. 116 (1942-2 Cum. Bull. 504, 591); H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942-2 Cum. Bull. 701, 708). The statement by the Chairman of the Senate Committee on Finance, Senator George, is an aid in showing the intent of Congress at the time of the 1942 amendments (1 Senate Hearings on the Revenue Act of 1942, 77th Cong., 2d Sess., p. 743):

I think it is recognized that the complete elimination of Section 116(a) was not really intended, that it was not the primary purpose in the case of the bona fide, nonresident American citizen who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country, but there is some need for treatment of this section, so that the technicians, American citizens who are merely temporarily away from home could be properly reached and properly dealt with for taxation purposes.

is to be strictly construed. *Helvering v. Northwest Steel Rolling Mills*, 311 U. S. 46, 61 S. Ct. 109, 85 L. Ed. 29.

The lower court came to the conclusion that the taxpayer had not borne this heavy burden, and this finding is supported by substantial evidence. It is urged that it therefore should be accepted by this Court as correct. See, *e.g.*, *Dunn v. Commissioner*, 220 F. 2d 323 (C. A. 9th); *Slaff v. Commissioner*, 220 F. 2d 65 (C. A. 9th).

That the taxpayer was not a bona fide resident of Australia, Canada or England during the taxable years becomes apparent from the record. The oral testimony was in clear accord that it was not the intent of the taxpayer to remain in any of the foreign countries which he visited for an indefinite period. The very nature of his unwritten contract of employment with Max Factor and Company supports this conclusion. The taxpayer entered into his employment with the intention of setting up manufacturing branches of the company wherever the company would send him, his purpose being to organize and supervise the establishment of plants in various foreign countries for his employer. It was the policy of the company to train citizens of the particular foreign countries in its manufacturing processes, and when the operation was running smoothly to remove its American technicians and leave such citizens in charge. While no particular length of time was fixed for the sojourn of the taxpayer in any of the foreign countries to which he was to be sent, it was understood at all times that his stay in the country in each instance was to be only of a temporary nature. [Findings of Fact IX, XI, XXI, R. 33, 34, 38.]

Assuming *arguendo* that the taxpayer may have introduced evidence to the effect that he intended to remain in foreign employment only and not to reside in the United States, it does not logically follow that he of necessity became a bona fide resident of every foreign country in which he sojourned. As the lower court stated in its Finding XXI [R. 38]:

By its very nature, his tour of duty in a foreign country for Max Factor & Company was temporary, company policy being to staff its foreign branches with citizens of the particular foreign country.

It can be seen that the terms of the taxpayer's employment contract precluded any intent on his part to be a bona fide resident of any of the countries in question. An intent to remain abroad does not equate with an intent to be a resident of any particular country. In each country he must have recognized that his stay was of a limited and temporary nature. One indication that such was the frame of mind of the taxpayer is presented in the Government's Exhibit A. [R. 89-96.]⁵ This exhibit sets forth

⁵The taxpayer argues [Br. 17] that the fact that he—
applied for and obtained exemption from Australian income tax has no significance in determining whether he was a "bona fide resident" there as that term is used in Section 116(a)(1) of the United States Internal Revenue Code of 1939.

Just why this is insignificant is not discussed, and the fact that the exemption from taxation was requested on the grounds of non-residency in Australia appears extremely relevant to the Government. The Government does not proceed to prosecute its case because of the fact that the taxpayer did not pay taxes to Australia for the greatest part of the time that he was in that country. The point is that the taxpayer's own statement confirms the fact that he was not a resident of Australia. It should be noted, however, that the nonpayment of taxes, while perhaps not conclusive in itself, is certainly a factor in the determination of whether or not a person is a bona fide resident of any particular country.

the application filed by the taxpayer with the Commonwealth of Australia for the purpose of obtaining exemption from income tax and social services contribution during the second year of his visit in Australia. In this certificate the taxpayer stated that he was a *nonresident* of Australia, and alluded to the temporary nature of his visit in that country. The taxpayer also reaffirmed the conditions of his employment when he described his duties in Australia as "To train local chemists in application of formulae and manufacturing operations in formulating products." [R. 93.] Once these local chemists were trained it was the intention of the taxpayer to leave the country, to move to another foreign country at the will of his employer. He recognized that his tenure in Australia, as well as in each of the other foreign countries he visited, was to be of a limited duration, he never intended to settle down in that country, and he fully intended to continue his employment with Max Factor and Company even though he recognized that his duties in connection with this employment would shortly call him to other shores. Once again, the Government can do no more than reiterate that the fact stressed by the taxpayer in testimony and argument, his intent to remain abroad for an indefinite period, is not relevant to a determination of whether or not the taxpayer established a bona fide residency in any particular foreign country. It is the establishment of such a bona fide residency that under Section 116(a) will determine whether the taxpayer's earnings are exempt from income taxation. When the statute requires that the taxpayer must be a bona fide resident of a foreign country or countries, it of course means that at any given time the taxpayer must be a bona fide resident of one particular foreign country. A

general intent to remain outside the geographical confines of the United States does not in itself satisfy this requirement. The statute does not call for a bona fide intent of nonresidency in the United States, as the taxpayer's argument presupposes.

While it is not the position of the Government that a prerequisite to the establishment of a bona fide residency is an intent to stay in the foreign country permanently, it is necessary that there be at least some intent to stay in the one country in question for an indefinite period of time, not limited by either a specific departure date or by a specific short-term job. In the case at bar the taxpayer knew that he would stay in each foreign country for only a relatively short period of time.⁶ In the cases which the taxpayer cites as supporting his claim for exemption from tax, the relevant factual situations present a far different pattern of intent than that of the instant case. In *Meals v. United States*, 110 F. Supp. 658 (N. D. Cal.), the taxpayer went to just one foreign country, Germany, and planned to remain in that specific country

⁶The testimony of the taxpayer shows that from his employment with Max Factor and Company in September, 1945, his time was spent approximately as follows [R. 60, 61, 62-63, 64, 70, 73, 74, 76]:

September 1945-December 1945, United States

January 1946-April 1946, Mexico

May 1946-United States

June 1946-October 1948, Australia

November 1948, United States

November 1948-July 1949, Canada

August 1949-December 1950, England

December 1950-February 1951, United States

February 1951, South America

for a substantial and indefinite period of time. The testimony of the taxpayer at bar can lead only to the conclusion that he did not intend to remain in any one foreign country for a substantial and indefinite period of time but rather that he anticipated moving from foreign country to foreign country in connection with his duties with Max Factor and Company. Likewise, in *White v. Hofferbert*, 88 F. Supp. 457 (Md.), the taxpayer was assigned by his company to service in Sweden for an *indefinite* period. The stay of the taxpayer herein in each of the foreign countries in which he was situated was always terminable at the time the plant operations of the company were running smoothly. Thus, although the taxpayer did not of necessity know the precise date upon which he was to leave the country, he always knew that upon the fulfillment of his specific mission he would move on to another foreign country. Hence, his stay in these countries cannot be termed indefinite; he must be considered a mere transient or sojourner.

Likewise undoubtedly of importance to the District Court in its conclusion that the taxpayer was not a bona fide resident of any foreign country were several other factors. The taxpayer's salary was deposited to his bank account in Los Angeles, California. [R. 36.] He rented a furnished apartment in Australia on a one-year lease [R. 36], and likewise rented a furnished apartment while in Canada [R. 37], rather than residences of a more permanent nature. He maintained his membership in a private club in the United States during all the years

involved. [R. 34.] He owned an unimproved residential lot in Los Angeles, and in fact, purchased from his first wife her joint interest in the lot after he had left the United States, making substantial payments on the trust deed encumbering the property during all the taxable years. [R. 35.] He married his second wife in the United States, although he met her in Australia. [R. 36-37.] While any of these factors might appear insignificant viewed *in vacuo*, their sum total together with the temporary nature of the taxpayer's stay in any given foreign country and his nonpayment of taxes to these foreign countries⁷ serves to weave a pattern of conduct which implies that the taxpayer never had any intention to become a bona fide resident of these foreign countries. So held the District Court upon hearing the evidence, and it is submitted that, since this finding was supported by substantial evidence and was not clearly erroneous, it should be accepted by this Court. *Dunn v. Commissioner, supra*.

⁷The taxpayer paid taxes to Australia for only the last four months of his sojourn in that country. [R. 36.] He testified on cross-examination that he did not pay Canadian or English income taxes. [R. 79.]

Conclusion.

For the foregoing reasons, it is submitted that the decision of the District Court that the taxpayer was not a bona fide resident of any foreign country during the years in question is clearly supported by the evidence and should be affirmed.

Respectfully submitted,

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October, 1956.

No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANTS.

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PAUL R. O'BRIEN, CLERK



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No. 15150

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN WEIBLE and PATRICIA WEIBLE,

Appellants,

vs.

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Appellee.

REPLY BRIEF OF APPELLANTS.

In Its Review This Court Is Not Restricted by the Findings and Conclusion of the District Court.

Appellee implies that the holding of the District Court may be reversed only if this Court finds that holding to have been clearly erroneous. (Appellee's Br. pp. 9, 18.) On the contrary, since the question here presented is a question of law or a mixed question of law and fact, this Court should review the entire record and in the light of all the evidence before it, substitute its judgment for that of the District Court if it finds that the conclusion of the District Court is contrary to the weight of the evidence. (*Commissioner v. Fiske*, 128 F. 2d 487 (C. C. A. 7, 1942), cert. den. 317 U. S. 635; *Bogardus v. Commissioner*, 302 U. S. 34, 39 (1937).)

Appellants Were “Bona Fide Residents” of Each of the Countries in Which They Lived During the Years 1947, 1948 and 1949 Within the Meaning of That Term as Used in Section 116(a)(1) of the Internal Revenue Code of 1939.

Underlying the argument of appellee in its brief and the holding of the District Court is the mistaken supposition that Section 116(a)(1) of the Internal Revenue Code of 1939 requires “domicile” in a foreign country or countries rather than “residence.”

Appellee argues that although appellants may have intended to remain abroad permanently they have not established bona fide residency in any particular country during the taxable years. This argument is premised on the fact that Weible intended, when he had established a smoothly-running manufacturing operation in one country operated by local personnel, to move to another country to repeat the operation. (Appellee’s Br. pp. 8, 12 *et seq.*) Therefore, appellee argues, taxpayer’s stay in each of the countries where he lived was “temporary” and therefore he did not become a “resident” of those countries.

Appellants respectfully submit that they have established that they were bona fide residents of Australia, Canada and England during the years in question. The statute itself contemplates that a taxpayer may be a resident of several countries during the taxable year by the use of the words, “a bona fide resident of a foreign country or countries during the entire taxable year . . .” (Sec. 116(a)(1), 1939 I. R. C.)

There is no requirement that the taxpayer live in the foreign country permanently or for a “long period of time” as appellee suggests. (Appellee’s Br. pp. 7, 9, 12.)

The test of bona fide residence as set forth in the regulations and established by the cases is whether the taxpayer "makes his home *temporarily*" (Reg. 111, Sec. 29.211-2; emphasis added) in a foreign country or countries with the intention of staying for an indefinite period of time to accomplish a purpose which is of such a nature that an extended stay may be necessary for its accomplishment. An intention to move his residence when that purpose is completed does not constitute a person a non-resident. (*White v. Hofferbert*, 88 Fed. Supp. 457 (D. C. Md., 1950); *Glackin v. Commissioner*, 110 Fed. Supp. 372 (D. C. S. D. Ill., 1952); Reg. 111, Sec. 29.211-2.)

In *White v. Hofferbert*, *supra*, the taxpayer intended to remain in Sweden for an indefinite period until his assignment there was completed and then to proceed to the next foreign assignment given to him. In February, 1942, he left Sweden after a stay of sixteen months (during which time he resided in a hotel) and went to Spain where he lived until December, 1946. He was held to have been a bona fide resident of Sweden in 1943, of Sweden and Spain in 1944 and of Spain in 1945. Taxpayer *Glackin* with similar intent worked in the offices of his company, Trans-World Airlines, in Egypt, Saudi Arabia and Iraq during the year 1950 and was held to have been a resident of those countries during that year within the meaning of Section 116(a)(1).

Contrary to the assertion of appellee (Appellee's Br. pp. 8, 13) appellants intended to remain indefinitely in each of the countries in which they made their home during the years involved. [R. 52-54, 63, 71, 73-74.] Under Weible's employment agreement his assignment in each of the countries to which he was sent was indefinite as

to duration and of a nature that required an extended length of time to accomplish. [R. 52-54, 63, 71, 73-74.] In the consummation of this agreement Weible did in fact live in Australia 28 months, in Canada for 8 months and in England for 17 months. [R. 63, 70, 73, 74.] His original intent was to complete the job of establishing a manufacturing operation in Canada but an emergency in the English branch necessitated a change in plans. [R. 54.] This unexpected change of plans does not alter the original intent to remain in Canada for an indefinite and extended time.

Appellee asserts that, "An intent to remain abroad does not equate with an intent to be a resident of any particular country." (Appellee's Br. p. 14.) Appellants submit that on the contrary the intent to remain abroad is an important evidentiary factor in determining the existence of an intent to become a resident of a particular foreign country. An intent to remain abroad signalizes an intent to abandon residence in the United States. Section 116 (a)(1) does not contemplate that a taxpayer have two independent "residences" at the same time. (*Seeley v. Commissioner*, 186 F. 2d 541, 543.) Therefore, by establishing their intent to remain in each of the countries where they were assigned for an indefinite and extended stay, and by negating any intent to return to a residence in the United States at the termination of such stay, appellants have carried their burden of proof in the strongest manner possible.

Appellee relies on the application which Weible allegedly filed with the Australian tax authorities to establish his non-residence in that country. (Appellee's Br. pp. 14-15.) The word "residence" is a slippery word and has many

meanings depending on the context in which used. (*Commissioner v. Svent*, 155 F. 2d 513, 515.) In determining the application of a United States statute, the law of this country rather than the law of Australia governs. The reason for Australia granting a tax exemption to foreign persons whose activities would assist in the development of Australian industry has no relation to the intent of Congress in formulating the exemption from income tax provided by Section 116(a), and therefore, assuming that Weible executed the application set forth in Defendant's Exhibit A, it cannot be concluded therefrom that Weible did not intend to become a resident of Australia as that term is defined in the American law.

Furthermore, the application purportedly executed by Weible was not properly authenticated and was erroneously admitted in evidence over plaintiff's objection on the grounds set forth in Plaintiffs' Supplemental Memorandum. [R. 81, 26-30.]

Appellee relies on the fact that Weible retained membership in a private club in the United States to bely his intent to become a resident of the countries here involved. However, Weible testified that when he left the United States he changed this membership to an inactive one which could be maintained at a nominal cost [R. 84] and that this membership enabled him to secure club privileges in the countries where he resided. [R. 69.]

Appellee also relies on the fact that Weible retained a vacant lot in this country on which he made mortgage payments during the taxable years. Appellants have found no cases, and submit that there are none, holding that the retention of property in the United States for investment purposes will deprive a taxpayer of the ex-

emption provided by Section 116(a). At most, the retention of that lot indicates an intent to return eventually to the United States, the place of Weible's domicile. Such an intent, of course, does not conflict with his intent to reside in Australia, Canada and England during the interim.

Respectfully submitted,

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No. 15151

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,
Respondent.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

OCT 13 1956



No. 15151

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America Before the National
Labor Relations Board

Case No. 21-CC-198

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,

and

MRS. EDWIN SELVIN.

Case No. 21-CC-200

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,

and

MRS. EDWIN SELVIN.

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Before: Wallace E. Royster, Trial Examiner.

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

Statement of the Case

Upon charges filed by Mrs. Edwin Selvin, the
General Counsel of the National Labor Relations

Board issued his consolidated complaint, dated June 21, 1955, against International Union of Operating Engineers, Local 12, herein called the Respondent,¹ alleging that the Respondent had committed unfair labor practices within the meaning of Section 8(b) (4) (A) and (B) and Section 2(6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

In respect to unfair labor practices, the complaint alleges that the Respondent has induced and encouraged employees of Yankee Body Shop, of Crowell & Larson, of Paving Materials Company, and of Union Pacific Railroad Company to engage in strikes or concerted refusals in the course of their employment to perform services for their respective employers with an objective of forcing or requiring their employers to cease doing business with Crook Company, hereinafter Crook, and to force or require Crook to recognize or bargain with the Respondent as the collective bargaining representative of Crooks employees. As further violations, it is alleged that the Respondent has induced and encouraged employees of Ralph Welker and of McCammon-Wunderlich Company to engage in strikes or concerted refusals in the course of their employment to perform services for their respective employers with an objective of forcing or requiring their employers to cease doing business with Shepherd Machinery Company, hereinafter Shepherd,

¹The complaint alleges, the answer does not deny, and I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

and to force or require Shepherd to recognize or bargain with the Respondent as the collective bargaining representative of Shepherd's employees.

The Respondent has filed an answer denying all material allegations in the complaint.

Pursuant to notice a hearing was held before the undersigned in Los Angeles, California, from July 25 through 28, 1955.² All parties were represented and participated in the hearing. A brief has been received from counsel for the Respondent.³

Upon my observation of the witnesses and upon the entire record in the case, I make the following:

Findings of Fact

I. The Business of Crook and Shepherd⁴

Crook Company is a corporation engaged at Los Angeles, California, in sales and servicing of construction equipment. Its annual sales of equipment exceed \$1,000,000 in value, of which more than

²The all-party stipulation to correct p. 115, l. 24 of the transcript so that the number there set forth will read 6Z6450 is approved and the correction noted.

³Respondent's motions to dismiss the complaint are denied except to the extent hereinafter set forth.

⁴I find no merit in Respondent's contention that the testimony of witnesses concerning the business operations of Crook and Shepherd is uncorroborated hearsay or that it is otherwise not probative. I find both to be in commerce within the meaning of the Act.

\$100,000 in value is sold to purchasers outside the State of California. About 90 per cent of the equipment purchased for resale is manufactured in States other than the State of California.

Shepherd is a partnership, engaged at Los Angeles, California, in sales and service of construction and farm equipment. Shepherd's purchases of such equipment from a manufacturer in Peoria, Illinois, exceed \$1,000,000 in value annually. Its shipments of equipment to purchasers outside the State of California exceed \$100,000 in value annually.

II. The Unfair Labor Practices

A. Concerning Crook

About February 17, 1955, the Respondent established pickets at Crook's premises. On March 3, when a consent election agreement was executed between the Respondent and Crook, the pickets were withdrawn. A representation election was conducted on March 9. No bargaining representative was chosen. Upon the ascertainment of that result Respondent's pickets reappeared and intermittently have remained. On May 17, the Respondent by letter to Crook denied that it was asserting any claim to have status as bargaining representative for Crook's employees.

1. Leroy Campbell, a Crook employee, testified that on March 15 he drove a truck, presumably the property of his employer, to Yankee Body Shop in

Los Angeles. According to Campbell he was followed by a man in a gray Chrysler sedan⁵ who spoke to an employee of Yankee before Campbell delivered the truck. Campbell testified that he had seen the driver of the Chrysler on many occasions among the pickets before the Crook shop and that on at least one such occasion the driver appeared to be directing the pickets. Campbell delivered the truck and left.

Ralph H. Ritz, an employee of Yankee Body Shop, a member of the International Association of Machinists, and shop steward for that organization at the place of his employment, testified that when some time in March a truck was brought to Yankee Body Shop, a man asserting himself to be an agent for the Operating Engineers told Ritz that the truck had come through a picket line at Crook; that the truck was "hot."⁶

The Respondent offered no evidence concerning this incident.

⁵The evidence establishes that the Respondent is the owner of a gray Chrysler sedan which on an earlier occasion was used to follow another Crook driver. I do not consider this circumstance to establish, however, that the Chrysler observed by Campbell was Respondent's property.

⁶Ritz had no recollection on the stand of hearing the word "hot" but testified that when he employed that word in a statement earlier given to a Board Field Examiner and when he testified to its utterance in an ancillary proceeding in the U. S. District Court, he was relying then upon a truthful recollection.

2. Fred Neuenschwander, a Crook employee, testified that on March 30 he went to a job in Glendora, California, where Crowell & Larson were operating some equipment. Neuenschwander's purpose was to make adjustments on machines which had been delivered to Crowell & Larson by Crook the previous day. Neuenschwander arrived on the job at about 11:45 a.m. and started to work. Crowell & Larson workers were then midway through their lunch period which had begun at 11:30. In about 15 or 20 minutes Joseph Mussro, a representative of the Respondent, approached and asked Neuenschwander the name of his employer and if he had come through a picket line. Neuenschwander answered the questions. Mussro then said Neuenschwander had better leave but almost immediately withdrew the suggestion by saying in a loud voice, probably audible to the Crowell & Larson employees who were standing nearby, "Well, you can go ahead and work, but we are not going to work." Neuenschwander said that he would be through with his job in a short time and continued at work. Neuenschwander left at about 12:15 p.m. having completed his job. Mussro and the Crowell & Larson employees were then in a conversation; none had returned to work after the lunch recess.

Tony Dias, a member of the Respondent and foreman for Crowell & Larson on the Glendora job, testified that he observed Neuenschwander and then Mussro arrive on the job. According to Dias,

had their lunch period on March 30 from 11:30 to noon. Upon his arrival Mussro asked what a Crook employee was doing on the job and was informed that the man was adjusting a Tournapull. Dias overheard Mussro tell Neuenschwander that the men would not work with him on the job. Mussro then checked the union membership cards of the Crowell & Larson employees and asked them if they did not know that a picket line existed at Crook and that it was "wrong" for a Crook employee to make repairs to equipment that could be made by members of the Respondent. Noticing that two Tournapulls appeared to be new, Mussro asked Dias if they had come through the Crook picket line. A few minutes before 1:00 p.m. Dias remarked that the men should return to work. Mussro agreed that they might do so but, having taken the serial numbers of the new Tournapulls, said that if he learned that the machines had come through the picket line, he would return and "shut down tight." Upon Mussro's departure, the men returned to work. Their employer, Crowell & Larson, did not pay them for the hour consumed by Mussro's visit.

Eugene Smedley, a Crowell & Larson employee, a member of the Respondent, and a witness to this incident, testified that Mussro asked if the employees knew that Crook was being picketed. Smedley overheard Mussro tell Neuenschwander that Respondent's members on the job would not work as long as Neuenschwander was on the job.

After checking membership cards, Mussro told the Crowell & Larson workers that they would violate some requirement of the Respondent if they worked while a Crook employee was on the job. Mussro said, according to Smedley, that if he discovered that the new Tournapulls had come through the picket line, he would return and shut down the job permanently and told the men to quit at once if a Crook employee returned to the job. Mussro left at about 12:55 p.m. and upon his departure the men resumed work, having been idled about one hour.

Joseph Mussro, one of the Respondent's business representatives, testified that he was at the Crowell & Larson job on March 30, that he spoke to Neuenschwander asking how long the adjustments would take, that he then checked Union cards and took the serial numbers of the new Tournapulls. Mussro denied that he suggested or directed that anyone cease work or refuse to work because of Neuenschwander's presence or that he made any mention of closing the job permanently. He explained that he collected serial numbers of equipment such as Tournapulls as a hobby. According to Mussro, he remained on the job about 30 minutes and left well before 1:00 o'clock.

3. Valentine Santillan, a Crook employee, on April 19 went to the freight dock of the Union Pacific Railroad Company in Los Angeles to prepare two rollers for delivery to Crook customers. According to Santillan, he was followed from the Crook shop by William Willis, a vice-president and

business representative of the Respondent. While Santillan and another Crook employee, Soles, were preparing the roller for delivery and maneuvering it from a flatcar to the freight dock, Willis remained on the scene. After about 2 hours Louis Vlashart, an employee of Paving Materials Company,⁷ appeared to take delivery of one of the rollers. As Santillan prepared to move the roller from the dock to the bed of Vlashart's truck, Willis came over and spoke to Vlashart. Vlashart then left, apparently to make a telephone call, and upon his return spoke again to Willis. Willis and another who had accompanied him, obtained picket signs from their car and began picketing alongside the dock.⁸ Vlashart then refused to accept the roller. Jessie Sands, described as an employee of Union Pacific, then spoke to Willis. Picketing ceased and Willis and his colleague departed. Vlashart, saying that he could not take the roller because of the picketing, had already done so. The picketing had taken place for a period of about 15 minutes beside the dock where the roller was situated for unloading.

Louis Vlashart testified that on April 19 he drove to the Union Pacific dock to pick up a roller. When he pulled his truck alongside the dock in preparation for loading, according to Vlashart, Willis ap-

⁷Vlashart was one of three drivers employed by Paving Materials Company.

⁸The wording of the picket signs does not appear.

proached him and asked if he knew that the roller was "hot." Vlashart said that he did not, whereupon Willias advised him that there was a picket line at the Crook shop, that the roller was "hot"; and suggested that Vlashart telephone the business agent of his union for advice. Vlashart answered that his employer had instructed him to take delivery if no picket line existed. Willis, or his companion, then said, "Well, if that is all it takes, we'll put one up right now." Both then took picket signs from the car in which they had been sitting and paraded in the vicinity of the truck and loading dock. Upon the telephoned advice of his employer, Vlashart then drove away leaving the roller.

Willis did not testify concerning this incident.

I do not consider the evidence to establish by the requisite preponderance that the individual who spoke to Ritz at Yankee Body Shop concerning the Crook truck was an agent of the Respondent. I credit Campbell's testimony that he had seen the man at the picket line before Crook's premises where he appeared upon occasion to direct the conduct of the pickets. This is insufficient to prove, however, that he followed the Crook truck at the direction of the Respondent for it may well be that his agency, if any, was specific rather than general and thus restricted to the picket line. His self-identification to Ritz as a representative of the Respondent might estop him from denying the agency but, of course, does not establish it. The precept that an agency may not be proved by the declara-

tions of the purported agent is rooted in sound principle. Ritz did not testify that this person, not identifiable from the record, was such an agent but only that he asserted himself to be such. The Respondent cannot be held liable for the conduct of one whose identity is not shown and whose authority to speak for it rests upon speculation. I conclude that the General Counsel has failed to establish any violation of the Act by virtue of the incident at Yankee Body Shop.

I credit the testimony of Dias and Smedley that Mussro said in their presence and within hearing of other Crowell & Larson employees that they would not work as long as a Crook employee was on the job. I further credit their testimony that Mussro said he would stop the men from working if he discovered that the Tournapulls came through the picket line. In reaching this conclusion I have, of course, refused to credit the denials of Mussro that he induced and encouraged Crowell & Larson employees in such fashion. I find that Mussro stayed at the job site for about 1 hour and that he was not occupied for that period in routine checking of union cards. Mussro's sworn testimony that he took the serial numbers from the Tournapulls in the practice of a hobby was deliberately false. I consider his entire testimony concerning the incident, except to the extent it was corroborated by Dias and Smedley, to be unworthy of credit.

The testimony of Santillan and Vlashart is uncontroverted and is credited. It follows that Willis

induced and encouraged Vlashart to refuse to accept delivery of the roller from Crook and that Vlashart was thus induced and encouraged to refuse to perform services for his employer. A purpose of the picketing on this occasion was to prevent Paving Materials, Vlashart's employer, from doing business with Crook. Willis was told what action was necessary to prevent acceptance of the roller and took it. The fact that Paving Materials instructed its driver to leave rather than take the roller in these circumstances affords no shield for the Respondent but serves only to accentuate the effectiveness of its picketing. I find no evidence that the picketing on this occasion was directed in any fashion toward employees of Union Pacific or that it took place at a point where it naturally would have the effect of inducing or encouraging them to refuse to perform services. In consequence I find no violation of the Act established by the evidence concerning any employee of Union Pacific.

B. Concerning Shepherd

The Respondent has never been certified as bargaining representative of Shepherd's employees but on May 23, 1955, placed pickets at Shepherd's premises bearing signs reading, "This firm is non-union." Later the signs were replaced by others reading, "Shepherd Tractor Company is unfair to organized labor." In March and April representatives of the Respondent asked Shepherd to sign a contract covering employees within Respondent's

jurisdiction. Shepherd suggested that an election be arranged in order to ascertain the employee's desired in the matter. This suggestion was rejected and the pickets appeared. Shepherd filed a representation petition with the Board on April 8. It was dismissed when Respondent disclaimed interest in becoming bargaining representative. Shepherd again filed a petition on May 15. Respondent then suggested a meeting to discuss an agreement.

1. On April 22, 1955, Leland Caquelin and Alfred Wladyka, both mechanics in Shepherd's employ, went to a construction site near or in Creal, California, to make repairs on machinery leased by Shepherd to Ralph Welker. The day passed without significant incident. Robert C. Rodgers, a member of the Respondent, and his helper, Busby, both employees of Welker, assisted the Shepherd employees in making the repairs. Caquelin and Wladyka returned on the 23rd and after working about 30 minutes were approached by Manuel De Flumere, a business representative of the Respondent who invited them to join the Respondent. Some discussion ensued concerning the advantages of union membership in which De Flumere said that there was to be a "crack-down" on employers of nonunion labor, particularly Shepherd, to stop the practice of nonunion workers taking jobs from union members. De Flumere conversed briefly with Rodgers, possibly within hearing of Busby, and left. He returned within a short time and again spoke to Rodgers before taking his final leave.

Upon De Flumere's second departure, Rodgers came to Caquelin and Wladyka and told them that they would have to leave or he and Busby would. Following instruction from Shepherd that in the event of threatened trouble of this nature they should retire, Caquelin and Wladyka left the job.

Rodgers testified that he was "acting" shop foreman for Welker on the Creal job having responsibility for keeping the machinery in repair. Busby was his helper. In the even of breakdown, the equipment operator affected generally would assist Rodgers in repairing the damage and in that situation would work under Rodgers' direction. It seems clear to me, however, and I find that Rodgers was not such a supervisor as the Act defines but was a skilled mechanic who, while working at his trade, directed the efforts of his assistant, Busby or another, in performing a repair job. Rodgers testified that De Flumere told him that the Shepherd employees were nonunion; that either they or Rodgers and Busby must leave the job. De Flumere did not testify.

I find that De Flumere instructed Rodgers to refuse to perform services for Ralph Welker as long as a Shepherd employee was on the job. This instruction may not have been heard by Busby, Rodgers' helper, but it is a reasonable inference, and I draw it, that De Flumere intended Busby to follow the same instruction. Both Busby and Rodgers were members of the Respondent.

2. On May 24, Ralph Sterling, an employee of Shepherd went to a reservoir project where McCammon-Wunderlich Company, hereinafter McCammon, was performing work, for the purpose of repairing brakes on equipment which had been sold by Shepherd to McCammon. Upon his arrival in a pick-up truck bearing Shepherd's name, Sterling was accosted by a man whom he identified as "Hunt" who asked if Sterling intended to do some work there. Sterling replied that he did and "Hunt" said that in such event he would "close the job down." Sterling went to report this development to Bob Bothel, McCammon's head mechanic, and while he was doing so "Hunt" drove about the project giving a "thumbs up" sign. According to Sterling this is a signal to equipment operators to cease work. In any event, they did so, driving their rigs to a central point and stopping the progress of the job.

Clint Waggoner, McCammon's superintendent, learning of the work stoppage, appeared on the scene, directed Sterling to leave, and told Red Hunter, Respondent's job steward on the reservoir project, that the Shepherd employees were leaving and that Hunter could send the men back to work. Work was resumed after an interruption of about 20 or 30 minutes. Waggoner then telephoned J. H. Seymour, a representative of the Respondent, and complained of the stoppage. Seymour answered that there was a picket line at the Shepherd shop

and that Shepherd employees would not be permitted to work at the reservoir job.

James Green, McCammon's carpenter foreman, testified that on May 24 he observed Hunter in conversation with a crane operator⁹ who was standing on the ground beside his equipment. Green asked the operator why he was not working. Hunter answered that a Shepherd truck was on the job and, in Green's presence, told the crane operator to swing the crane boom out and drop his load or he would be fined \$100. The operator asked Green for advice and the latter suggested that he do as he was told. Hunter then left, according to Green, giving the "thumbs up" signal to other workers. In consequence all work ceased.

James Luther and Raymond Thomason, both employees of McCammon and members of the Respondent, testified that in the early morning of May 24 all of the equipment operators decided to cease work if nonunion men appeared on the job. Both testified that Hunter was not present when this decision was reached and denied that such a course of action had been suggested by any representative of the Respondent. Each testified that he quit work when he saw the Shepherd truck arrive on the job and that he saw no signal to quit work given by Hunter. Hunter did not testify.

⁹The crane operator was an employee of Valley Crane Service but worked on the reservoir job under the direction of Foreman Green.

I credit the uncontroverted testimony of Foreman Green concerning Hunter's words and conduct and find that on the morning of May 24 Hunter threatened the crane operator with a fine if he did not cease work. That the operator was not paid directly by McCammon is not controlling. He was before the work stoppage performing services for McCammon under the direction of McCammon's foreman. I find further that the "thumbs up" signal which Green saw Hunter give to McCammon employees constituted a direction from Hunter as a representative of the Respondent that they cease work for McCammon. Even if Luther and Thomason testified truthfully that without suggestion or encouragement from any representative of the Respondent the equipment operators decided not to work when a nonunion man appeared on the job (and I have serious doubts concerning the veracity of this testimony) Hunter's threat to the crane operator and his signaling to other workers constituted an encouragement to them to adhere to that **determination**. The man named by Sterling as "Hunt" may just possibly have been someone other than Hunter but it is unnecessary to reach a finding on that point. If Sterling talked to and observed Hunter what he saw and heard is merely corroborative of the already credited testimony of Green. Finally, I credit the uncontradicted testimony of Waggoner that Seymour admitted it to be the purpose of the Respondent to prevent McCammon from doing business with Shepherd.

Conclusions

By inducing and encouraging employees of Crowell & Larson and Paving Materials Company to refuse to perform services for their respective employers with an object of forcing or requiring such employers to cease doing business with Crook, the Respondents have violated Section 8 (b) (4) (A) of the Act. Harold McNeel, labor relations representative and assistant manager of the Respondent, testified that the picket lines at Crook and Shepherd existed for the purpose of protesting discharges and the practice of nonunion workers finding employment in the same field as members of the Respondent. However, this case does not place in issue the legality of the picket lines about the premises of either employer. It is only when inducement and encouragement of employees of other employers to refuse to perform services is established that a violation in the terms of this complaint occurs. Such inducement and encouragement has been found as well as one of its objectives. I am convinced and find that the other alleged objective, to force Crook to recognize the Respondent as bargaining representative of Crook employees, has also been proven. True, the Respondent has formally disclaimed such a purpose but testimony that since such disclaimer attempts have been made to persuade Crook to extend recognition is undenied. I find that in inducing and encouraging employees of Crowell & Larson and Paving Materials Company to refuse to perform services for their respective employers, the Respondent had as an

objective forcing or requiring Crook to recognize or bargain with it as the representative of Crook employees without having been certified as such representative. The Respondent thereby violated Section 8 (b) (4) (B) of the Act.

By De Flumere's instruction as to employees of Welker and by Hunter's words and signals directed to employees of McCammon, the Respondent induced and encouraged such employees to refuse to perform services for their respective employers with an object to force or require these employers to cease doing business with Shepherd. I find this to constitute a violation of Section 8 (b) (4) (A) of the Act. As in the Crook situation, another objective, at least until and on May 11, 1955, was to force or require Shepherd to recognize or bargain with the Respondent as the representative of Shepherd employees without having been certified as such representative. The Respondent thereby violated Section 8 (b) (4) (B) of the Act.¹⁰

¹⁰It is entirely possible that the Respondent has now abandoned this objective as to both Crook and Shepherd. Its representative, McNeel, testified at this hearing that it entertained no such ambition. However, as recently as May 11, it sought a meeting with Crook, Shepherd, and other employers to negotiate an agreement. It is true that under date of May 17 the Respondent advised the Regional Office of the Board that it did not claim to represent Crook or Shepherd employees. There is reason to believe, however, that this disclaimer was tactical as within a week or 10 days one of Respondent's representatives requested a meeting with Crook for the purpose of reaching agreement concerning Crook's employees.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section II above, occurring in connection with the operations of Crook and Shepherd, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that the Respondent has violated Section 8 (b) (4) (A) and (B), it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. For reasons set forth above, it will be recommended that the complaint be dismissed to the extent that it alleges violations to have occurred concerning Yankee Body Shop and Union Pacific Railroad.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Union of Operating Engineers, Local 12, is a labor organization within the meaning of Section 2 (5) of the Act.
2. International Union of Operating Engineers, Local 12, has engaged in unfair labor practices

within the meaning of Section 8 (b) (4) (A) and (B) of the Act by inducing and encouraging employees of Crowell & Larson and Paving Materials Company to engage in a strike or concerted refusal in the course of their employment to perform services for their respective employers, objectives thereof being:

(a) To force and require such employers to cease doing business with Crook Company and to force the said Crook Company to recognize or bargain with International Union of Operating Engineers, Local 12, although that organization has not been certified as the bargaining representative of Crook employees in accordance with the provisions of Section 9 of the Act.

3. International Union of Operating Engineers, Local 12, has engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) and (B) of the Act by inducing and encouraging employees of Ralph Welker and McCammon-Wunderlich Company to engage in a strike or concerted refusal in the course of their employment to perform services for their respective employers, objectives thereof being:

(a) To force and require Welker and McCammon to cease doing business with Shepherd Machinery Company; and

(b) To force and require Shepherd Machinery Company to recognize and bargain with International Union of Operating Engineers, Local 12, as

the collective bargaining representative of Shepherd employees, although that organization has not been certified as such bargaining representative in accordance with the provisions of Section 9 of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that International Union of Operating Engineers, Local 12, Los Angeles, California, its officers, representatives, agents, successors, and assigns be ordered to:

1. Cease and desist from:

(a) Inducing and encouraging employees of Crowell & Larson and Paving Materials Company, or of other employers (other than Crook Company), to engage in a strike or concerted refusal in the course of their employment to perform services for their respective employers where an object thereof is to force or require Crowell & Larson or Paving Materials Company, or other employers, to cease doing business with Crook Company or to force or require Crook Company to recognize or bargain with the above-named labor organization as the collective bargaining representative of its employees, unless and until said labor organization

has been certified as such bargaining representative in accordance with the provisions of Section 9 of the Act.

(b) Inducing and encouraging the employees of Ralph Welker and McCammon-Wunderlich Company, or of other employers (other than Shepherd) to engage in a strike or concerted refusal in the course of their employment to perform services for their respective employers where an object thereof is to force or require Welker or McCammon or any other employer to cease doing business with the Shepherd Machinery Company or to force or require Shepherd Machinery Company to recognize or bargain with the above-named labor organization as the collective bargaining representative of its employees unless and until said labor organization has been certified as such bargaining representative in accordance with the provisions of Section 9 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at its business office in Los Angeles, California, copies of the notice attached hereto as an appendix. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by an official representative of Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all

places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of this Intermediate Report and Recommended Order as to what steps it has taken in compliance therewith.

It is further recommended that unless the Respondent shall within twenty (20) days from the receipt of this Intermediate Report and Recommended Order notify the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

It is finally recommended that the complaint be dismissed with respect to the allegations concerning unfair labor practices involving Yankee Body Shop and Union Pacific Railroad.

Dated this 7th day of September, 1955.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

Appendix

Notice

To All Members of International Union
of Operating Engineers, Local 12

Pursuant to

The Recommendations of a Trial Examiner
of the National Labor Relations Board and in order
to effectuate the policies of the National Labor Re-
lations Act, we hereby give notice that:

We Will Not induce or encourage any employees
of Crowell & Larson, of Paving Materials Com-
pany, or of any other employer (other than Crook
Company), to engage in a strike or concerted re-
fusal in the course of their employment to perform
services for their respective employers where an
object thereof is to force or require Crowell & Lar-
son or Paving Materials Company, or other em-
ployers, to cease doing business with Crook Com-
pany or to force or require Crook Company to
recognize or bargain with us as the representative
of its employees, unless and until we have been
certified as such representative in accordance with
the provisions of Section 9 of the National Labor
Relations Act.

We Will Not induce or encourage any employees
of Ralph Welker, of McCammon-Wunderlich Com-
pany, or of any other employer (other than Shep-
herd Machinery Company), to engage in a strike

or concerted refusal in the course of their employment to perform any services for their respective employers where an object thereof is to force or require Welker or McCammon-Wunderlich, or other employers, to cease doing business with Shepherd Machinery Company, or to force or require Shepherd Machinery Company to recognize or bargain with us as the representative of its employees, unless and until we have been certified as such representative in accordance with the provisions of Section 9 of the National Labor Relations Act.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,
(Labor Organization.)

Dated:

By,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 21—CC—198

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,

and

CROOK COMPANY.¹

Case No. 21—CC—200

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,

and

WILLARD W. SHEPHERD and NORMA D.
SHEPHERD, d/b/a SHEPHERD MA-
CHINERY COMPANY.

DECISION AND ORDER

On September 7, 1955, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Re-

¹The caption in this consolidated proceeding has been amended to show the names of the employers involved rather than the name of Mrs. Edwin Selvin, the individual who filed the charges on behalf of the employers. Furthermore, although the Intermediate Report designates Mrs. Selvin as appearing "pro se," she appeared as the representative of both employers, and the Report is hereby corrected accordingly.

spondent had engaged in certain unfair labor practices within the meaning of Section 8 (b) (4) (A) and (B) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of those allegations. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the exceptions, additions, and modifications noted herein.

A. Jurisdiction

1. The Trial Examiner predicated his findings regarding the business operations of both employees upon testimony of the general manager of Crook and the assistant general manager of Shepherd. The Respondent contended at the hearing, and in its exceptions and brief, that this testimony consisted of uncorroborated hearsay, conclusions, and opin-

ions, and did not constitute an adequate basis for the assertion of jurisdiction.²

However, as both witnesses were familiar with the operations of their respective companies and testified from their personal knowledge, and as the Respondent presented no witnesses and did not cross-examine the general counsel's witnesses on this issue, we find, as apparently did the Trial Examiner, that the testimony of the two officials is not only competent and credible, but of sufficient probative value to warrant the assertion of jurisdiction over both employers.³

B. The Violations of Section 8 (b) (4) (A)
of the Act

2. The Trial Examiner found, and we agree, that the Respondent, by inducing and encouraging employees of Crowell & Larson to refuse to per-

²The Respondent relies upon *Haddock Engineers, Ltd.*, 215 F. 2d 734 (C.A. 9, 1954), in which the Court denied enforcement of the Board's order against the respondent union on the ground that the union's objections to the adequacy of the commerce evidence were well taken. That case is distinguishable from the present one, however, as the data upon which jurisdiction was premised in that case was presented in written form, and the individual who had prepared the written material was not under oath nor available for cross-examination. See *W. B. Jones Lumber Company, Inc.*, 114 NLRB No. 79.

³*Casey-Metcalf Machinery Co., et al.*, 114 NLRB No. 229, wherein the Board recently asserted jurisdiction over Crook.

form services for their employer with an object of forcing or requiring such employer to cease doing business with Crook, violated Section 8 (b) (4) (A) of the Act.

The Respondent began picketing the Crook premises about February 17, 1955. On March 30, Neuenschwander, a Crook employee, went to a job site of Crowell & Larson to adjust some machines which had been obtained from Crook. While he was thus engaged, Mussro, a business representative of the Respondent,⁴ came to the job site. He asked Neuenschwander the name of his employer and whether he had come through a picket line. When Neuenschwander admitted that he had come through the picket line, Mussro first instructed him to leave, but then remanded this instruction and announced that Neuenschwander could finish his work "but we are not going to work." This remark was made, as the Trial Examiner found, within the hearing of the Crowell & Larson employees. It also appears that it was made in a loud voice, as Neuenschwander was slightly hard of hearing; and that the Crowell & Larson employees were having their luncheon at the time and had gathered in the vicinity. In addition, as the Trial Examiner found, Dias and Smedley, employed by Crowell & Larson, testified that they heard Mussro make such remarks to Neuenschwander. In these circumstances, we con-

⁴It is undisputed, and we find, that Mussro, whose conduct constitutes a part of the evidence relied upon herein, was acting within the scope of his general authority on the occasion involved.

clude that Mussro's remarks were audible to the assembled Crowell & Larson employees.

What occurred thereafter supports the finding that Mussro was overheard by the Crowell & Larson employees, and also that his statement had the effect of inducing those employees to stop working until Neuenschwander left.⁵ When the luncheon recess came to an end, the group of employees did not return to work but continued to converse with Mussro. While the Respondent contends that the men were delayed in their return to work because Mussro was making a routine check of their union cards, we note that Mussro admitted that he ordinarily checked one card at a time so that the remaining employees could proceed with their work. And the fact that the card check took considerably longer than it ordinarily did is not explained by Mussro's position that it was prolonged by certain employees raising various personal problems while he was checking the cards. The testimony of the witnesses whom the Trial Examiner credited does not support this assertion, and, in any event, there was no more reason for the entire group to be present during such discussions than for all of them to be present while Mussro checked each card.

⁵Whether or not Mussro instructed the Crowell & Larson employees in so many words not to resume working after the luncheon recess until Neuenschwander left, this was clearly implicit in what he did say. See Seattle District Council of Carpenters, et al. (Cisco Construction Company), 114 NLRB No. 12.

The explanation for the delay is found, as the Trial Examiner pointed out, in the credited testimony of Dias and Smedley. According to them, while Mussro was talking to the Crowell & Larson employees, he reminded them that Crook was being picketed, told them they should not work while a Crook employee was repairing equipment at the job site, asked if the machines on which Neuenschwander had been working came through the picket line, took the serial numbers of these machines, and threatened that if he found they had come through the picket line he would return and "shut down tight."⁶

Although Dias was the foreman on the job, and had authority to order the men back to work, it does not follow, as the Respondent argues, that any work stoppage therefore resulted from his failure to do so. As Dias explained in his testimony, he did not direct the men to return to work because of Mussro's threat to shut down the operation if the men did not assemble as he directed. The immediate cause of the failure to return is the threat itself.

After Neuenschwander had departed, the men returned to work with Mussro's permission. The work

⁶We agree with the Trial Examiner that Mussro's denials of the remarks and conduct attributed to him, and his claim that he took the serial numbers in pursuance of a hobby were patently incredible. Nor does the fact that the Crowell & Larson employees thereafter operated the Crook equipment, and that Mussro never did return to shut down the operation, prove that he did not threaten to do so, as the Respondent contends.

stoppage had lasted about an hour after the end of the luncheon recess, and the employer deducted an hour's wages from each of the men. This is hardly consistent with the Respondent's arguments that the men were delayed in returning to work because their foreman failed to direct them to do so, or because they were awaiting delivery of equipment, or because of the other equally unpersuasive reasons, unconnected with Mussro's presence, which were advanced by the Respondent.

The Respondent states in its brief, as to Mussro's activity: "When viewed unemotionally, this incident at best is merely a sporadic momentary failure to return to work." But the determination as to whether a union has violated the Act by inducing a proscribed work stoppage does not depend upon the duration of the stoppage. As Mussro's conduct was designed to cause a concerted refusal by the Crowell & Larson employees to work while Neuenchwander was present, the extent to which this purpose met with success is immaterial.⁷

⁷See *Associated Musicians of Greater New York*, 110 NLRB 2166, enf'd. *NLRB v. Associated Musicians*, Nov. 3, 1955 (C.A. 2) 37 LRRM 2041. In *Local 11, United Brotherhood of Carpenters & Joiners of America, AFL, et al. (General Millwork Corporation)*, 113 NLRB No. 124, p. 4, the Board stated: "To constitute inducement in the statutory sense, it is not necessary that the union's appeal succeed in producing a strike or concerted refusal to work; it is enough that the appeal was made with that purpose."

3. The Trial Examiner found, and we agree, that the Respondent, by inducing and encouraging employees of McCammon-Wunderlich Company to refuse to perform services for their employer with an object of forcing or requiring such employer to cease doing business with Shepherd, violated Section 8 (b) (4) (A) of the Act.

The Respondent began picketing the Shepherd premises on May 23, 1955. On May 24, one Sterling and an unidentified helper, employees of Shepherd, went to a job site of McCammon to repair some equipment which had been obtained from Shepherd. They came in a truck bearing Shepherd's name. Hunter,⁸ the Respondent's job steward on this project, asked Sterling if the Shepherd shop was being picketed, and Sterling admitted that it was. Hunter then asked Sterling if he intended to do some work there. When Sterling replied that he did, Hunter threatened to close the job down while Sterling was working there. Hunter proceeded to drive about the project giving the "thumbs up" signal to cease work. The equipment operators stopped working and congregated at a central point. According to the uncontradicted testimony of Waggoner, the superintendent of the project, which we

⁸On the basis of Sterling's description of the individual he referred to as "Hunt" and the testimony of other witnesses about this incident, we find that "Hunt" was a designation of Hunter. We also find that Hunter's conduct with relation to the Shepherd employees was within the scope of his general authority as a union steward.

credit, upon being informed about the work stoppage, he directed Sterling to leave, and then told Hunter that Sterling was leaving and Hunter could tell the men to go back to work. Work was resumed upon Sterling's departure. Estimates of the length of the work stoppage varied from 20 to 45 minutes.

Like the Trial Examiner, we find no merit in the Respondent's contention that the work stoppage was a voluntary spontaneous action engaged in by the operators without any inducement from the Respondent and, in fact, without even its knowledge. Hunter did not testify. Two employees called by the Respondent, Luther and Thomason, testified that before work began at 4:00 a.m. on the day of the Shepherd truck incident, a number of the equipment operators met and agreed to stop working if a nonunion man came on the job, or as Thomason put it on cross-examination, "if the Shepherd truck came on the job." These two witnesses were vague and contradictory in their testimony about the meeting. However, they were consistent in asserting that Hunter, who worked the same shift and generally arrived 10 or 15 minutes before work began, was not present, that they did not know where he was, and that no other union representative took part in the meeting. Both testified also that when the Shepherd truck appeared, various operators drove around giving the thumbs up signal. Again there was vagueness and contradiction in their testimony as to the identity of the operators who did so, but the same unanimity that Hunter was not in sight.

Under all the circumstances and on the entire record, including the fact that the Trial Examiner stated that he had "serious doubts concerning the veracity of this testimony," we do not credit the testimony of Luther and Thomason.

As the Trial Examiner also found, other indications that Hunter caused an unlawful work stoppage are shown by the fact that Foreman Green heard Hunter direct a crane operator to stop working while the Shepherd truck was there or risk a \$100 fine. When Green asked Hunter the reason for this action, Hunter told him there was a Shepherd truck on the job and so the job was shut down. When the crane operator asked Green what he should do, Green advised him to comply. The Respondent maintains that the crane operator's work stoppage was therefore attributable to Green rather than to the Respondent. It is obvious, however, that the foreman's permission to the operator to comply with Hunter's demand rather than subject himself to a fine was not the real cause of the operator's work stoppage and cannot absolve the Respondent of liability for Hunter's threats.

Finally, the Trial Examiner found, in connection with this Shepherd incident, that Waggoner called Seymour, a representative of the Respondent, at the union office, and protested the work stoppage. Seymour told him that as there was a picket line at the Shepherd shop, Shepherd employees would not be permitted to work at the project. Upon inquiry by Waggoner, Seymour stated that Shep-

herd employees could not do even the work called for by warranties on the equipment obtained from Shepherd, and that Waggoner could not purchase parts from Shepherd. Seymour did not testify. The Respondent contends that Seymour was not adequately identified and was not shown to be an agent of the Respondent. Waggoner testified, however, that he called the union office and asked for Seymour, and that when a man who identified himself as Seymour came to the telephone, Waggoner recognized his voice from prior conversations. Furthermore, Seymour is identified in the record as personal representative to Bronson, business manager of the Respondent.

In conclusion, we are convinced, from the entire record, that the Respondent caused the McCammon employees to engage in a prohibited work stoppage in order to force McCammon to stop doing business with Shepherd. As we found above, the Respondent engaged in similar unlawful activity, involving employees of Crowell & Larson, directed against Crook. The complaint alleged, and the Trial Examiner found, that certain other acts of the Respondent, involving other employers than McCammon and Crowell & Larson, also constituted secondary boycotts in violation of the Act. As we would issue the same kind of restraining order against the Respondent whether it was predicated on one or more violations of this type, we are of the opinion that "no good purpose could be served

in considering each incident separately with a view of determining whether it constitutes a violation.”⁹

According, without passing upon the other incidents discussed in the Intermediate Report, we find that the Respondent violated Section 8 (b) (4) (A) as to both of the employers herein by inducing and encouraging employees of Crowell & Larson to refuse to perform services for their employer with an object of forcing or requiring such employer to cease doing business with Crook, and by inducing and encouraging employees of McCammon-Wunderlich Company to refuse to perform services for their employer with an object of forcing or requiring such employer to cease doing business with Shepherd.

C. The Violations of Section 8 (b) (4) (B)
of the Act

4. The Trial Examiner found, and we agree, that the Respondent, in inducing and encouraging employees of Crowell & Larson to refuse to perform

⁹Joliet Contractors Assn. v. NLRB, 202 F. 2d 606 (C.A. 7, 1953), cert. denied 346 U. S. 824.

The Respondent states in its brief, in connection with the McCammon incident: “Even though a finding of a technical violation might be made, which we do not concede, standing alone as it now does, it is not sufficient to warrant a finding of a violation of 8(b) (4).” We are satisfied, however, that the violation we have found based upon the McCammon incident was not merely a technical one. Furthermore, as set forth above, such a violation warrants the issuance of an order whether or not it stands alone.

services for their employer, had as an objective forcing or requiring Crook to bargain with it as the representative of the Crook employees without having been certified as such representative, in violation of Section 8 (b) (4) (B) of the Act.

The Respondent began picketing the Crook premises about February 17, 1955. The pickets were withdrawn when Crook entered into a consent election agreement with the Respondent on March 3. The employees voted against representation by the Respondent in the ensuing election. Thereafter the picketing was resumed and has been conducted intermittently since then.

On May 11, 1955, the Respondent sent a letter to a number of employers in the area, including Crook. This letter was signed jointly by representatives of the Respondent and of another union. It was signed for the Respondent by Seymour, personal representative, on behalf of Business Manager Bronson. The letter was as follows:

During the past several months, we have at various times, attempted to arrange a meeting with the Equipment Distributors in Southern California, for the purpose of discussing an Agreement between your firm and the below signatory Unions.

The Operating Engineers, in handling the procedures, have been advised by Mr. W. W. Shepherd of the Shepherd Machinery Company, that he, Mr. Shepherd, had been delegated by the various firms, to speak for them.

In discussing this issue with Mr. Shepherd, it was evident that we could not proceed and enter into negotiations.

We are, therefore, requesting that a representative of your Company be present May 16, 1955, at 10:00 a.m. at the Operating Engineers' Building, 2323 West 8th Street, Los Angeles, California, for the purpose of entering into negotiations with the Unions involved, to conclude a workable Agreement. The Unions will have a proposal to offer at this meeting.

On May 16, Crook filed its petition which was incorporated with several other employer petitions in the Casey-Metcalf case.¹⁰ On May 17, the Respondent wrote to the Board in connection with the petitions in Casey-Metcalf, that it did not claim to represent a majority of the employees in any of the units set forth in those petitions. About a week or 10 days later, however, Seymour called W. G. Crook, principal stockholder of Crook, and, according to the latter's uncontradicted testimony, requested an appointment, stating that "he would like to make an agreement with us and a contract as to our labor situation."

The Respondent repeated, at the hearing and in its brief, its disavowal of any claim to be the bargaining representative of the Crook employees. It sought to justify the continued picketing of the Crook premises on the grounds that it was in pro-

¹⁰See footnote 3 above.

test of (1) an alleged discriminatory discharge of ten employees, and (2) the performance by non-union employees of work involving the maintenance and repair of equipment operated by the Respondent's members, as jurisdiction over such work had been awarded to the Respondent by the American Federation of Labor.

The testimony of credited witnesses establishes that the ten employees were laid off, are being called back to work as business operations warrant, and were permitted to vote in the consent election without challenge. Moreover, although the layoffs occurred on February 15, the Respondent ceased picketing after the consent election agreement was entered into on March 3, and resumed after the election results were announced. It is evident therefore that the picketing was not directed against the layoffs but was designed to obtain recognition despite the adverse election results. We, therefore, find no merit in the Respondent's first ground for maintaining the picket line. We likewise find no merit in the second ground as the Respondent's actions in some of the situations discussed in the Intermediate Report¹¹ did not involve the maintenance or repair of equipment operated by its members. Moreover an intra-union ruling cannot constitute a defense to unlawful conduct,¹² nor can

¹¹Although we have not passed upon the legal effect of these incidents, we find that they occurred as set forth in the Intermediate Report.

¹²Sub Grade Engineering Company, 93 NLRB 406, 407.

secondary boycott activity be justified on the ground that the union involved had a motive which would have been lawful if the activity had been lawful.¹³

Accordingly, we find that the Respondent's repeated disclaimers of representative status were not made in good faith in view of its picketing and other inconsistent conduct detailed above, manifesting a desire to gain representative status without Board certification.¹⁴ We find, therefore, upon the entire record, that an objective of the Respondent's conduct was to force or require Crook to recognize it as the collective bargaining representative of the Crook employees without its having been selected as such representative, in violation of Section 8 (b) (4) (B) of the Act.

5. The Trial Examiner found, and we agree, that the Respondent, in inducing and encouraging employees of McCammon-Wunderlich Company to refuse to perform services for their employer, had as an objective forcing or requiring Shepherd to bargain with it as the representative of the Shepherd employees without having been certified as

¹³Washington-Oregon Shingle Weavers' District Council, et al. (Sound Shingle Co.), 101 NLRB 1159, enf'd. NLRB v. Shingle Weavers' Council, 211 F. 2d 149 (C.A. 9, 1954).

¹⁴Francis Plating Co., 109 NLRB 35; Petrie's, 108 NLRB 1318; Pasco-Kennewick Building Trades Council (Cisco Construction Co.), 111 NLRB 1255.

such representative, in violation of Section 8 (b) (4) (B) of the Act.

In about January, 1955, a union representative got in touch with Montgomery, the assistant general manager of Shepherd, and, according to the latter's uncontradicted testimony, stated "that the union would like to establish a contract with the Shepherd people * * *" During March and April, Bronson and Seymour approached Montgomery several times to discuss a contract. At one point they submitted a contract in effect at another similar operation, and requested that Shepherd enter into such a contract. Montgomery suggested that, as the Respondent had not established that it represented the Shepherd employees, it should seek a Board election. The representatives of the Respondent replied that no election was desired.

Shepherd filed a representation petition with the Board on April 8, but it was dismissed by the Regional Director following the Respondent's filing on April 15 of a disclaimer of representative interest. Thereafter the Respondent distributed a notice to the Shepherd employees requesting them to attend a meeting to discuss representation, and Shepherd received the Respondent's May 11 written request, set forth above, to meet and discuss an agreement. Shepherd considered these actions inconsistent with the Respondent's disclaimer, and again filed a petition on May 15 (21-RM-350), which was one of the petitions filed in the Casey-Metcalf case, *supra*. On May 17 the Respondent

filed with the Board the disclaimer referred to above in connection with Crook. On May 20, because of the Respondent's disclaimer, Shepherd withdrew its petition, and the withdrawal was approved on June 15.

After Montgomery took the position that a Board election should be sought, Bronson and Seymour discontinued their negotiations with Shepherd. The Respondent began picketing Shepherd about May 23, picketed continuously until a few weeks before the hearing, and has picketed intermittently since then.

The Respondent maintains that it was picketing Shepherd to protect its grant of jurisdiction over work which was being done by nonunion Shepherd employees. We found this same contention without merit as to the Crook picketing, and are similarly convinced, upon the entire record, that it was not the real reason for picketing Shepherd. Accordingly, we are convinced, and find, that the Respondent's disclaimers are of no effect in view of its inconsistent actions. We further find, upon the entire record, that one of the Respondent's objectives was to force or require Shepherd to recognize it as the collective bargaining representative of the Shepherd employees without its having been selected as such representative, in violation of Section 8 (b) (4) (B) of the Act.¹⁵

¹⁵We do not adopt the Trial Examiner's limitation that this was an objective of the Respondent "at least until and on May 11, 1955," but find that it has been a continuing objective of the Respondent.

Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Union of Operating Engineers, Local 12, Los Angeles, California, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Inducing and encouraging the employees of Crowell & Larson, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their employer where an object thereof is to force or require Crowell & Larson, or any other employer, to cease doing business with Crook Company, or to force or require Crook Company to recognize or bargain with the above-named labor organization as the collective bargaining representative of its employees, unless and until said labor organization has been certified as such bargaining representative in accordance with the provisions of Section 9 of the Act.

(b) Inducing and encouraging the employees of McCammon-Wunderlich Company, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their employer where an object thereof is to force or require McCammon-Wunderlich Com-

pany, or any other employer, to cease doing business with Shepherd Machinery Company, or to force or require Shepherd Machinery Company to recognize or bargain with the above-named labor organization as the collective bargaining representative of its employees unless and until said labor organization has been certified as such bargaining representative in accordance with the provisions of Section 9 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at its business office in Los Angeles, California, copies of the notice attached hereto as Appendix A.¹⁶ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the official representative of the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

¹⁶In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order."

(b) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington D. C., January 9, 1956.

[Seal] NATIONAL LABOR
 RELATIONS BOARD,
BOYD LEEDOM,
 Chairman,
IVAR H. PETERSON,
 Member,
PHILIP RAY RODGERS,
 Member.

Appendix A

Notice

To All Members of International Union
Of Operating Engineers, Local 12

Pursuant To
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not induce or encourage the employees of Crowell & Larson, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their employer where an object thereof is to force or re-

quire Crowell & Larson, or any other employer, to cease doing business with Crook Company, or to force or require Crook Company to recognize or bargain with us as the collective bargaining representative of its employees, unless and until we have been certified as such bargaining representative in accordance with the provisions of Section 9 of the National Labor Relations Act.

We Will Not induce or encourage the employees of McCammon-Wunderlich Company, or any other employer, to engage in a strike or concerted refusal in the course of their employment to perform any services for their employer where an object thereof is to force or require McCammon-Wunderlich Company, or any other employer, to cease doing business with Shepherd Machinery Company, or to force or require Shepherd Machinery Company to recognize or bargain with us as the collective bargaining representative of its employees, unless and until we have been certified as such bargaining representative in accordance with the provisions of Section 9 of the National Labor Relations Act.

Dated

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12

(Labor Organization.)

By

(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twenty-First Region

Case Nos. 21-CC-198 and 21-CC-200

In the Matter of:

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 12,

and

MRS. EDWIN SELVIN.

PROCEEDINGS

Pursuant to notice, the above-entitled matter
came on for hearing at 1:30 o'clock p.m.

Before: Wallace E. Royster, Trial Examiner.

Appearances:

ERNEST L. HEIMANN,

Appearing on Behalf of the General Coun-
sel of the National Labor Relations
Board.

JAMES M. NICOSON,

DAVID SOKOL,

Appearing on Behalf of International
Union of Operating Engineers.

MRS. EDWIN SELVIN,

Appearing on Behalf of Crook Company
and Shepherd Machinery Company.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-I, inclusive, for identification, were received in [5*] evidence.)

* * *

RALPH STERLING

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. By whom are you employed, Mr. Sterling?

A. Shepherd Machinery Company.

Q. And what is your job there?

A. I am a field mechanic.

Q. And how long have you been so employed?

A. Going on nine years.

Q. I see. Now, on or about May 24th, were you sent out to a job in Stone Canyon? A. I was.

Mr. Nicoson: Just a minute. I move to strike that answer for the purpose of interposing an objection.

I object to any and all testimony or evidence with respect to this or any other evidence, with respect to so-called McCammon-Wunderlich, for reason there is no charge on file with the board or before the Board, or before the Trial Examiner, [120] which sustains any allegation of this complaint.

* * *

(Testimony of Ralph Sterling.)

Q. (By Mr. Heimann): All right, what did you go out there [121] for?

* * *

The Witness: I was sent out to fix a brake band on a big tractor.

Q. (By Mr. Heimann): Who sent you out?

A. Shepherd Machinery.

* * *

Q. (By Mr. Heimann): All right, you were supposed to put brake bands into a tractor?

A. That is right.

Q. And, did you go out there? A. I did.

Q. And, when did you arrive out there?

A. I would say somewhere between 9:00 and 9:30, and——

Q. How did you go out there?

A. I went out in the company pick-up.

Q. Was the name of the company appearing on the pick-up? A. It did.

Q. Did you talk to anyone there?

A. Yes; I did. [122]

Q. To whom did you talk?

A. I talked to Mr. Wagonner.

Q. Who is Mr. Wagonner?

A. The gentleman sitting over there; the Superintendent on Stone Canyon.

* * *

Q. And then what did you do?

A. Well, I drove out there. When I got there,

(Testimony of Ralph Sterling.)

there is a guy on Number 12 Patrol, drives up and asked me if I was going to work out there.

Q. All right, describe that guy?

Mr. Nicoson: Pardon me. Number 12, what?

The Witness: Patrol, that is the motor grader.

Mr. Nicoson: You say he drove up?

The Witness: Yes.

Q. (By Mr. Heimann): You say he drove up on his motor grader? A. He did.

Q. All right. Do you know the name of that man? A. Well, his name is Hunt. [123]

* * *

Q. Will you describe the man?

A. I would say he weighed around one hundred and eighty, seventy-five to one hundred and eighty. He has a sort of sandy complexion.

Q. About how tall?

A. I would say around five, nine.

Q. About how old?

A. I would say between thirty and forty.

Q. And what color of hair, if you remember?

A. Sort of indo-red, sort of sandy.

Q. Did you say dusty, or sort of?

A. It is not what you call a red. Sort of in between a red and a brunette, I would say.

Q. I see. All right, was anybody else present when he talked to you?

A. Well, there was a kid with me. I took a helper. He was standing over by the pick-up.

Q. What was the name of the kid?

(Testimony of Ralph Sterling.)

A. Ed, is all I know. [124]

Q. Pardon?

A. Ed. All I know is his first name.

Q. He is another Shepherd employee?

A. That is right.

Q. All right; now, what did Mr. Hunter say to you, what did you say to him?

A. He asked me if I was going to work out there. I told him I was. He said, "If you do, I will close the job down. I got authority to do so." I told him I was on a warranty job. I told him that Mr. Wagonner would have to come down and ask me to leave or I would have to go ahead with the procedure.

* * *

Q. (By Mr. Heimann): Did he say anything about Shepherd?

A. Yes; he asked me if there was a picket line around Shepherd. [125]

Q. What did you answer?

A. I told him there was.

Q. All right, so what did you do then; what did he do then?

A. I walked over to Bob Brussel, Master Mechanic on Stone Canyon, I told him what took place.

* * *

The Witness: I told him what the man told me he was going to do. He was going to close the job down.

Q. What did he do about it?

(Testimony of Ralph Sterling.)

A. He asked me to stand by until he went up to the office to see Mr. Wagonner in the meantime. Then the man drove around and closed the job down.

Q. How did he close the job down?

A. He drove around on Number twelve sticking up his thumbs; it would be like this [126] (indicating).

* * *

Q. (By Mr. Heimann): Mr. Sterling, are you a member of any union? A. I am.

Q. What union? A. Local 3, Engineers.

Q. Do you have frequent occasions to go out on construction jobs? A. Can I have that again?

Q. Do you have occasion to go out on construction jobs frequently?

A. Well, I followed construction jobs for quite a few years; I have.

Q. I see. Have you ever seen that signal, thumbs up, used before? A. I have.

Q. Once, or more than once?

A. More than once.

Q. What was the result of that signal?

A. You pull in. The signal of that is quitting time, pull in for lunch, or anytime they want you to pull in.

Q. Now, what happened after that thumbs signal?

A. Why, the operators started to pull in and parking their equipment.

Q. All of them you saw? [127]

(Testimony of Ralph Sterling.)

A. All I could see. [128]

* * *

Q. (By Mr. Heimann): All right. Now, did you have any further conversation with that Mr. Hunt, as you recall?

A. I did after Mr. Wagonner came down and asked me to leave the job.

* * *

Q. All right then, go on.

A. Mr. Bothel went up and talked to Mr. Wagonner. Mr. Wagonner came down and asked me to pull off the job so the men could go back to work, until he could contact the union and find out what it was all about.

I had a brake band that I brought up for them that belonged to them.

Q. Was that for the tractor you were supposed to repair? A. No; it was not.

Q. It was another brake band?

A. Yes. I started to leave it with Mr. Bothel, he asked me to. Mr. Hunt comes up and tells him he can't accept the part. [129]

* * *

Q. (By Mr. Heimann): All right.

A. I asked him why I couldn't leave the band; the band that belonged to them.

Q. To whom?

A. To McCammon-Wunderlich. He said he didn't know that. So, he went ahead and allowed me to leave the band.

(Testimony of Ralph Sterling.)

Q. All right. And, did you leave then?

A. I did.

Q. Did you see whether the job was running again, when you left?

A. Well, they didn't start up until I got up on top of the hill. I looked back and noticed they had started pulling out again. [130]

* * *

Q. Did Mr. Hunt say anything to you at any time as to when the work will go on. When the operators will continue working?

A. When I left; yes. [131]

Q. Just what did he say?

A. He said, "When you get off the job, we will go back to work."

Q. All right. And, when did he tell you that?

A. He told me that when we had to talk about the brake band.

Q. I see.

Mr. Heimann: No further questions.

Cross-Examination

By Mr. Nicoson: [132]

* * *

Q. Mr. Wagonner? What did Mr. Wagonner tell you?

A. Mr. Wagonner asked me to pull off the job so the operators would go back to work, so that he could find out what it was all about.

Q. How much time did all this take? [141]

(Testimony of Ralph Sterling.)

A. I would say a period of twenty or thirty minutes.

Q. So that, when Mr. Wagonner told you to drive off the job, you went off?

A. That is right.

* * *

Q. (By Mr. Nicoson): Didn't you say you told Mr. Hunt you were going to stay on the job until Mr. Wagonner told you to [142] get off?

A. I told him I would have to stay until Mr. Wagonner asked me to leave.

Q. So you did stay there until Mr. Wagonner asked you to leave? A. I did.

Q. When Mr. Wagonner asked you to leave, you left? A. I did. [143]

* * *

Recross Examination

By Mr. Nicoson:

Q. Mr. Sterling, will you describe the truck that you were driving that morning?

Trial Examiner: Could you speak a little louder?

Q. (By Mr. Nicoson): I am sorry. Mr. Sterling, will you please describe the truck that you drove that morning?

A. I will. It is a Chevrolet, three-quarter ton pick-up, painted yellow. It had a big sign on each side of the Shepherd Tractor and Equipment Company. [146]

* * *

JIMMY C. GREEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann: [151]

* * *

Q. What is your occupation, Mr. Green?

A. Carpenter foreman.

* * *

Q. And, for whom do you work?

A. McCammon-Wunderlich Company.

Q. And where do you work?

A. Stone Canyon Reservoir.

Q. And was that your occupation in May 1955?

A. It was.

Q. Now, do you remember an occasion in May, 1955, when a Shepherd's truck came out on the Stone Canyon Job? A. Yes.

Q. And, how did you find out about it?

A. Well, I had a rig operating, crane was operating, setting a thimble.

Q. What is a thimble?

A. It is a gate thimble, and outlet structure construction out there. [152]

* * *

Q. (By Mr. Heimann): All right. It is a gate thimble used in construction of outlet structures building on the job. I see. What is the purpose of the thimble?

A. To control the supply of waters to main lines out of the reservoir.

(Testimony of Jimmy C. Green.)

Q. Now, who was doing that?

A. My foreman was having it done. I was doing it with a Link-Belt Crane.

Q. Were you operating the crane? A. No.

Q. Who was operating the crane?

A. The operator's name, I believe, was Tru-Yound.

Q. I see. That was another employee of McCammon-Wunderlich?

A. He was employed by Valley Crane Service. We had the crane on rental service.

Q. I see. Now, would you go on and tell us how you found out about the Shepherd truck being there?

A. Well, I was coming across the fill and I saw a crane, Number 12 crane, stopped. They were talking to the operator on the rig crane that [153] stopped.

* * *

Q. (By Mr. Heimann): But you said the operator was on the ground?

A. The operator of the crane was on the ground.

Q. What was he doing at that time?

A. He was talking to Red Hunter.

Q. Now, who is Red Hunter?

A. At that time, he was steward on the job.

Q. How did you know he was steward?

A. He was wearing the button.

Q. What kind of a button?

A. A steward button on his hat.

Q. I see. What union? A. Local 12.

Q. All right. Now, who was present during that conversation? A. No one. What conversation?

(Testimony of Jimmy C. Green.)

Q. Between Red Hunter and the crane operator?

A. I don't know of any one.

Q. Were you there?

A. I came up about the time they were [154] talking.

* * *

Q. I see. Now, what did Mr. Hunter say to the crane operator; what did he say to you; what did the crane operator say to him?

* * *

The Witness: I asked the operator why they were shut down. Hunter said that a Shepherd truck was on the job and the job was shut down. He told the operator of the other crane to drop his load and swing the boom out, or he would be fined a hundred dollars. The operator asked me what to do. And, I told him to do as he was told.

Q. (By Mr. Heimann): About what time of the day was that?

A. I would say it was between nine and [155] ten.

* * *

Q. Do you remember whether you said anything else to Hunter?

A. The only thing was, I asked him why. He said, there was a Shepherd truck on the job and that they were shut down.

Q. Anything else that you remember?

A. I believe he asked me what I was going to do, and, I told him I was going to see Mr. Wagonner.

(Testimony of Jimmy C. Green.)

Q. I see. Anything else you remember?

A. Nothing other than, I told the crane operator to set the load down and swing out as he was told.

* * *

Q. Now, did you see what Mr. Hunter did then?

A. He got on his blade and went across the fill.

Q. And, what did he do?

A. He was giving other operators the thumbs up signal to shut down.

Q. I see. And, did they shut down?

A. Yes.

Q. And, about how many pieces of equipment shut down?

A. I don't know, I would say they have around thirty pieces of equipment operating on the job at that time. [156]

Q. Did you see whether Red Hunter went around to all of them? A. No, I didn't.

Q. About how many did you see that he went around to? A. Oh, I would say five or six.

Q. Would you tell us about how long the shut down lasted?

A. I would say thirty to forty-five minutes. [157]

* * *

Cross-Examination

By Mr. Nicoson: [158]

* * *

Q. And, was this the only employee of the Valley Crane Service that was on the job, as far as you know? A. No, there was an oiler on it.

(Testimony of Jimmy C. Green.)

Q. Pardon?

A. There was an oiler on it, on the crane.

Q. There was two of them there? A. Yes.

Q. They took instructions from you as to where to work, when to work, how to work, and so on?

A. That is right.

Q. So, you would tell them where to make lifts?

A. Yes.

Q. What to do and so forth? A. Yes.

Q. How long had they been working with you before this particular day?

A. I don't know the actual time. I would say, two months. [161]

* * *

Redirect Examination

By Mr. Heimann:

Q. Do you know whom the equipment operators were employed? That is—let me ask you this first? You said, Red Hunter was giving the thumbs up signal to about six or eight equipment operators?

A. That is right.

Q. Do you know whose employees they were?

A. They were McCammon-Wunderlich employees.

Q. You said that Mr. McCammon-Wunderlich rented the crane together with the operators?

A. It is operated and maintained.

Q. Pardon?

A. Operated and maintained by Valley Crane Service.

(Testimony of Jimmy C. Green.)

Q. Yes. And you happen to know who paid the wages of the crane operator?

A. I would say they operate and maintain it, I would assume Valley Crane pays it.

Q. Don't assume anything.

A. Valley Crane pays, I would say. [166]

* * *

CLINT E. WAGGONER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. What is your occupation?

A. Superintendent.

Q. And where? A. Stone Canyon Project.

Q. And for whom? [167]

A. McCammon-Wunderlich.

Q. And, for how long?

A. That date, I don't have. I am sorry. I don't have it without looking at the records.

Q. Well, approximately?

A. I believe it was in December, when I was appointed Superintendent.

Q. About December of 1954?

A. Yes, somewhere there.

Q. On or about May 23rd, were you notified of any shut down on the Stone Canyon job?

(Testimony of Clint E. Waggoner.)

Mr. Nicoson: May that be answered yes or no.

The Witness: Yes.

Q. (By Mr. Heimann): And, who notified you?

* * *

The Witness: Mr. Green. Jimmy Green and Bob Bothel.

Q. (By Mr. Heimann): And, when you were so notified, what did you do?

A. Proceeded to the job. [168]

* * *

Q. And what did you do there?

A. I immediately contacted Shepherd's mechanics and told them to leave so we could proceed with the job, as I understood that was the trouble.

Q. How did you understand that?

A. Being told that Shepherd was on the job.

* * *

Q. (By Mr. Heimann): So, then you told the Shepherd mechanics to leave the job, right?

A. Yes. [169]

Q. Did you talk to somebody else?

A. Next, I talked to Red Hunter.

Q. All right. Who is Red Hunter?

A. At that time, he was on blade operating for McCammon-Wunderlich Company.

Q. Did he have any position with the union?

A. He was the steward.

Q. Have you had previous dealings with him in the capacity of his being steward? A. Yes.

Q. More than once? A. More than once.

(Testimony of Clint E. Waggoner.)

Q. And, what did you say to Red Hunter?

A. That he could send the boys back to work, that I had told Shepherd's people to leave the job.

Q. All right. Did Hunter say anything to you?

A. Not that I recall.

Q. What did he do?

A. He proceeded to start the boys out again on their equipment.

Q. And, they started out again, right?

A. That is right.

Q. Now, after that, did you make a phone call to Local 12? A. I did.

Q. And did you dial the number of Local 12, or did somebody [170] dial it for you?

A. I had it dialed by the office manager.

Q. I see. And who answered the phone?

A. I asked for Mr. Seymour.

* * *

Q. Did Mr. Seymour come to the phone?

A. In some short time, yes.

Q. Had you talked with Mr. Seymour on the telephone before? A. Numerous times.

Q. You recognized his voice over the telephone?

A. Yes, I do.

Q. What did you tell Mr. Seymour, what did he tell you?

A. I told him I thought he was being unfair to me on that job.

Q. What did he tell you?

A. I—he didn't. I don't believe he understood the thing as it was that morning.

(Testimony of Clint E. Waggoner.)

Q. Well, what did he say? [171]

A. Those words, I don't have that answer to that.

Q. Well, approximately. I don't mean the exact words?

A. I believe he asked me, did I know that Shepherd people were being picketed. [172]

* * *

Q. Now, does that refresh your recollection as to anything [173] else that Mr. Seymour said in the telephone conversation on the date of the shut down?

A. Only that we could not have Shepherd people on the job until such a time that that thing was straightened out with the Shepherd Equipment.

Q. All right. Does it refresh your recollection as to anything additional that you said?

A. I asked him about the warranties on the equipment, all being bought from Shepherd Equipment.

Q. What did he say to that?

A. That we could not do it.

Q. Does it refresh your recollection as to anything he said about parts?

A. I inquired about parts and he was willing to recommend places where we could buy parts.

Q. Did he recommend such places? A. No.

Q. I see. Did you ask him whether you could buy parts from Shepherd? A. Yes.

Q. What was his answer?

A. We could not.

Q. Now, by the way, you mentioned something about warranty; would you tell us what that warranty was?

(Testimony of Clint E. Waggoner.)

A. That is a thousand hours on tractors with 20's and 21's, [174] and on Number 12 Auto Patrols.

Q. Now, what does thousand hours mean?

A. What is the obligation; thousand hours operating time on that particular piece of equipment.

Q. During the first thousand hours of operating time, Shepherd was to perform service on the equipment?

A. That is right. [175]

* * *

Q. Does that statement refresh your recollection whether you had any conversation with Mr. Hunter at any subsequent time, regarding the shut down?

A. Later on that same shift, I would say.

Q. I see. What did you tell Mr. Hunter then? What did he tell you?

A. I told Mr. Hunter, Red as we know him, I figured he done wrong in pulling the job without notifying me or my office.

Q. What did Mr. Hunter say to that, if anything?

A. No answer.

Q. No answer?

A. No answer.

* * *

Cross-Examination

By Mr. Nicoson:

Q. Mr. Waggoner, what time of day was it that you talked with Mr. Seymour on the day the Shepherd man was out there?

A. I didn't keep that time. [176]

* * *

(Testimony of Clint E. Waggoner.)

Q. What was the first thing that you said to Mr. Seymour when he came on the telephone?

A. I believe I asked him if he knew that our job had been shut down.

Q. What did he say?

A. At that time, he didn't.

Q. He did not know the job had been shut down?

A. No.

Q. Go ahead, what else did he say, or did you say?

A. I don't have the rest of that conversation.

Q. You don't remember the rest of it?

A. No. [177]

* * *

Q. Did you tell him the job had started up again?

A. I did.

Q. Did you tell him how long the job had been down? A. Approximately.

Q. What did you tell him?

A. I told him we were shut down approximately thirty minutes.

Q. About thirty minutes?

A. I guess that is about the time the job was shut down.

* * *

Q. I think you just testified, in answer to my question, the job was down about thirty minutes?

A. Approximately.

Q. Did anybody keep a stop-watch on it and time it? A. Not that I know of.

Q. As far as you know, it could have been twenty minutes?

(Testimony of Clint E. Waggoner.)

A. It could have been twenty, or it could have been forty-five, one way or the other.

Q. You have no way of knowing exactly how long the job was down?

A. Approximately thirty minutes.

Q. All right. Now, when you told Mr. Hunter to put the men back to work, he did, and they did, didn't they? [178]

(No response.)

Q. Is that right?

A. Yes, he put them back to work.

Q. As soon as you gave the word, the men went back to work?

A. As soon as I told him the Shepherd men were leaving the job.

Q. And went back to work?

A. That is right. [179]

* * *

FRED NEUENSCHWANDER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. By whom are you employed?

A. By Crook Company.

Q. What is your occupation?

A. I am a mechanic.

Q. How long have you been so employed? [180]

(Testimony of Fred Neuenschwander.)

A. About fifteen years.

Q. Now, on or about March 30th, did you go out to a job in Glendora? A. I did.

Q. And, where was that job located?

A. Well, Colorado Avenue and Pasadena Avenue in Glendora, at the intersection.

Q. Do you know who was the contractor on that job? A. Yes, I do. It was Crowell & Larson.

Q. All right. For what purpose did you go out there?

A. Well, I had to make some adjustments on a couple of new machines that were delivered the day before.

Q. What kind of machines were they?

A. Letourneau-Westinghouse Tournapulls, dirt-moving machines.

Q. How did you go out there?

A. Well, the Crook Company pick-up.

Q. Did it have a sign on it?

A. Yes, it did.

Q. It said Crook Company, or something like that? A. Yes.

Q. Now, when did you get there, approximately?

A. Well, approximately a little after 11:30. I should say around 11:45.

Q. And, were there any Crowell & Larson employees on that job? [181]

* * *

A. Yes, there were; they were eating lunch.

Q. They were stopped?

(Testimony of Fred Neuenschwander.)

A. Stopped. Shut down and eating lunch.

Q. Did you talk to any of them?

A. I asked them which machine was giving the trouble. They told me which one it was. Pointed out to me which machine.

Q. What did you do then?

A. Well, I got my tools out of the pick-up and went over to work on the machine.

* * *

Q. All right. Now, when you started working there, what happened while you were working, if anything?

A. Well, I should say, I worked about fifteen or twenty minutes maybe, on the machine. Then, Mr. Joe Mussro, as I know him, came up and asked me my name; who I worked for; who sent me out there.

I answered his questions.

Q. Did he say who he was? [182]

A. Yes. He introduced himself.

Q. Did he say what his job was?

A. No, he didn't exactly say what his job was.

Q. Whom he worked for?

A. Yes. He said that he was with Local 12. I met him before, down at the shop. I knew what his business was.

* * *

Q. All right. Did he say anything else to you?

A. Well, then he said, "Well, I think you had better leave the job." And, at that point, he said, "Well, you can go ahead and work, but we are not

(Testimony of Fred Neuenschwander.)

going to work." He said that pretty loud so all the the men around there could hear it.

Mr. Nicoson: Just a minute. I move to strike that latter portion.

Trial Examiner: That part of the answer which says, "so all the men around there could hear it," may go out.

Q. (By Mr. Heimann): Now, at that time, where were the other men standing, or sitting?

A. Well, it seemed like they all followed him out to where he was. They were eating lunch under a tree a little ways back. [183]

All followed him up to where I was working. Fairly close, I should say eighteen to twenty feet. Something like that; outside of the machines.

Q. You say Mr. Musro talked in a loud voice?

A. Fairly loud, to be sure all the men could hear it.

Q. From your judgment, could all the men there hear it? A. Should have.

Mr. Nicoson: Object to on the grounds that no proper foundation having been laid, calls for a conclusion of the witness.

Trial Examiner: Overrule objection.

Mr. Nicoson: May I briefly ask the witness one question.

Trial Examiner: Go ahead.

Mr. Nicoson: Are you hard of hearing?

The Witness: Little bit.

Mr. Nicoson: Renew my objection.

(Testimony of Fred Neuenschwander.)

* * *

Q. (By Mr. Heimann): Do you remember whether Mr. Mussro said [184] anything else to you during that conversation?

A. Well, I don't recollect of anything, no.

Q. Did he mention anything about Crook Company?

A. Well, he asked me, he says, "Did you come through the picket line down there?" I said, "Yes, I did."

Q. I see. Now, did you say anything else to Mr. Mussro?

A. Well, at the time, when he said, you had better leave, or something like that, I said, "Well, I am going to be through here in five or ten minutes, and I will be gone."

Q. Did you finish your job? A. I did.

Q. How long did it take you to finish, approximately?

A. Well, at least half or three-quarters of an hour to make that adjustment.

Q. What did you do then?

A. Well, I picked up my tools and went out to my pick-up.

Q. And took off? You left then?

A. Well, I put them in the pick-up. I watched for a minute or two to see what was going on.

Q. All right. What did you see, if anything, that was going on?

A. Well, Mr. Mussro called all the men over to

(Testimony of Fred Neuenschwander.)

his car, which was standing just behind this machine, and he was talking to them and, [185] evidently——

* * *

Q. (By Mr. Heimann): You didn't hear what he said to the men, is that right?

A. Not for sure, no.

Q. Did you see anything?

A. All the men were taking out card permits, or something, and showed it to Mr. Mussro, and, evidently, he looked at their name.

Mr. Nicoson: Just a minute.

The Witness: And looked at their card.

* * *

Q. (By Mr. Heimann): All right. Tell us what you saw? A. And, he wrote something down.

Q. All right.

A. And, I watched for a minute.

Q. All right.

A. As he was going on and counted six or seven men; got in my pick-up and left. That was the end of the work.

Q. Do you know approximately when you left?

A. Well, it was a little after 12:00 o'clock.

Q. You don't know how long after 12:00?

A. No, I didn't have a watch with me. It was approximately ten or fifteen minutes after 12:00, I guess. [186]

* * *

(Testimony of Fred Neuenschwander.)

Cross-Examination

By Mr. Nicoson: [187]

* * *

Q. Where was this machine located in relation to where the men was eating?

A. Well, they were to the right of it.

Q. About how far away, were they?

A. Eighteen to twenty feet.

Q. To where they were eating lunch under the tree? A. Yes, they were further than that.

Q. How far?

A. I can't say. I would judge, probably, forty feet. Some might be a little more. I don't [191] know.

Q. Now, when Mr. Mussro came over there, he, you said, talked in a loud voice?

A. He did, when he made the remark, "We are not going to work."

Q. All right. He told you that in a loud voice, is that your testimony? A. Well, yes.

Q. And, you say Mr. Mussro seen and talked to you before?

A. Well, he spoke to me around the shop there.

Q. Several times?

A. As I said, two or three times.

Q. He knew you were hard hearing?

A. I don't know if he did, or did not.

Q. He knew people had to talk louder than the normal tone of their voice, isn't that true, to make you understand?

(Testimony of Fred Neuenschwander.)

A. They don't have to talk too loud, maybe just a little bit. [192]

* * *

Redirect Examination

By Mr. Heimann:

Q. You said that Mr. Mussro made that remark with, not going to work, in a loud voice?

A. Fairly loud, yes.

Q. In what tone of voice was the other conversation between you and him?

A. Oh, just normal.

Q. Was it not as loud?

A. Loud enough so I could hear.

Q. Well, was the remark, "We are not going to work," was that louder or not?

A. Yes, it was a little louder.

Q. All right. You say the men were at first forty feet away from you?

A. Somewhere around there.

Q. At the time Mr. Mussro made that remark, how far away?

A. Well, should say around eighteen feet, maybe a little less. I don't know. [193]

* * *

EUGENE SMEDLEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. On that date, when did you have your lunch time? [195] A. At 11:30 on that day.

Q. When do you usually have it?

A. At 12:00 o'clock.

Q. What was the reason for having it earlier that day?

A. We were waiting for a pushcat to arrive on the job. We stopped to eat at 11:30, so we would be ready to go to work as soon as it got there. It would get there about 12:00.

Q. Was your usual lunch hour at 12:00?

A. Yes.

Q. How long is it?

A. Half an hour, 12:00 to 12:30.

Q. Now, on that day did you see—well, let me ask you this, you saw the last witness this morning, Mr. Neuenschwander? A. Yes.

Q. On that date, did you see him out on the job?

A. I did.

Q. What time did he arrive there, approximately?

A. Approximately a quarter until 12:00.

Q. What did he do when he got there?

A. Well, he asked us which one of the pieces of

(Testimony of Eugene Smedley.)

equipment was giving us trouble. We told him which one it was.

Q. By the way, which one was it?

A. It happened to be the one I was running.

Q. Then he went and worked on it?

A. Yes. [196]

Q. What happened then?

A. Well, I guess he had been working on it just a few minutes, five or ten minutes, when Mr. Joe Mussro appeared on the job.

Q. Now, who is Mr. Joe Mussro?

A. Business representative.

Q. Of what union? A. Local 12.

Q. You know him as such? A. Yes.

Q. You are a member of Local 12?

A. Yes.

Q. All right. What did Mr. Mussro do when he got there at that thing?

A. Well, he asked us first if we knew that the Crook Company was being boy—, picketed, on which there was pro and con answers.

Q. By the way, when *you us*, who do you mean?

A. Well, I and the other operators and personnel working on the job there.

Q. How many other personnel were there, approximately?

A. There were about six, approximately.

Q. About six. By whom were they employed?

A. Crowell & Larson.

Q. All right. Now, he asked you whether you

(Testimony of Eugene Smedley.)

knew that Crook Company was picketed. You gave the answers you indicated. [197]

Then, what happened?

A. Well, he proceeded to go over to the Crook Company man that was making adjustments on the tournapull, and asked him his name.

Q. Did you hear what he said?

A. Yes, I did hear it.

Q. All right. Go ahead.

A. He asked his name; whether he came through the picket line; who sent him out—of which, he answered to all those questions.

Q. Pardon? Of which he did answer to all those?

* * *

The Witness: Well, he asked how long was he going to be, to that effect. He said, he had a few minutes longer to go. He told him he had better leave now. The mechanic said, in five or ten more minutes, he would be finished, and would finish it up.

Mr. Mussro told him he could take his time and he in turn would pull his operators off the job.

Q. (By Mr. Heimann): That is what he said?

A. Yes. [198]

* * *

Q. All right. Then Mr. Mussro turned and walked back to his car, in that direction?

A. Yes, it was to his car.

Q. Yes, go ahead?

(Testimony of Eugene Smedley.)

A. After he got over to the car, he was checking cards. Checking our cards for identity clearance.

Q. Did you hear him say anything to you or to the other employees? A. Mr. Mussro?

Q. Yes?

A. Say anything to us? Well, there was a matter of conversation going on, I don't recall what it was all about.

Q. Did he say anything relating to the man from Crook Company?

A. Yes. He ordered us that as long as there was a picket line there, that the man came through the picket line to work on the equipment, then we were in some type of violation by working, something to that order. That is as close as I can say.

Q. I see. Anything else?

A. Then he noticed the equipment was new and asked when it was delivered, of which he was informed it had been delivered the day before. And, he wanted to know whether they had come through the picket lines or not. Which, we couldn't answer that. I wasn't present when they were delivered, and he said [199] that he was going to take the serial numbers of the equipment, which he did.

He informed us that he was going to check on them and see whether they had come through the picket line and, if they had, we would be shut down permanent when he came back.

Q. Now, what else did Mr. Mussro do during that time, if anything?

A. Well, during that period of time, he was

(Testimony of Eugene Smedley.)

checking our identification, as I said. It all didn't happen at once. As time when on, he was checking one individual and talking with us at the same time.

Q. And, how long did it take him to do that?

A. Well, he was there—he got there somewhere in the neighborhood of five minutes until twelve, and he left the job about five minutes until one. [200]

* * *

Q. All right. Now, has Mr. Mussro come out on jobs before to check cards?

A. Yes, more times.

Q. More than once?

A. Yes, several times.

Q. How long does it usually take him to check these cards?

A. Usual procedure is to stop one or two pieces of equipment at the same time and check their identification and clear them, and return those to working.

Over-all average job, such as we had there, it shouldn't have taken over ten minutes at the longest, I believe.

Q. Now, you say Mr. Mussro left about five minutes until one. Did he tell anything to you then?

A. Well, he had given us the order to go back to work.

Q. When was that?

A. That was just shortly before he left.

Q. And, had the Crook Company man gone by then? A. Yes, he had left some time earlier.

(Testimony of Eugene Smedley.)

Q. All right. Did Mr. Mussro say anything else regarding the equipment?

A. Well, other than to inform us that we were to immediately walk off the job if Crook Company was ever to come on to our job, from there on. [201]

Mr. Heimann: No further questions.

Cross-Examination

By Mr. Nicoson:

Q. Did you know where they got the tournapull from that you were working on, Mr. Smedley?

A. At the time, no, I didn't know.

Q. Did you learn about it that particular day, where it came from?

A. I heard rumors to the effect where it might have come from.

Q. You heard it came from the Crook Company, didn't you?

A. Yes, I heard it did. [202]

* * *

Q. But, there was considerable talking among the men at the time this business agent was there this particular day?

A. Yes, they were bringing up different things.

Q. Now, when the business agent, or business representative, came on the job, it was also his duties, is it not, to talk to the men, or the men will talk to him about different things, transfers, beefs, or what not?

A. Yes.

Q. You understand it was his job to listen to those to see what he could do to make the men satisfied?

A. That is right.

(Testimony of Eugene Smedley.)

Q. That is his job? A. That is right.

Q. So, when a business agent comes on the job, he has to listen to these men with their problems, the conversation, whether he likes it or not?

A. Yes.

Q. That is routine, isn't it?

A. That is routine, yes.

Q. You attended many of those sessions like that, since you have been in this business, haven't you? A. Yes, I have. [205]

Q. Nothing unusual about that? A. No.

Q. There are times when he comes on the job that there is not as much conversation, he checks the cards and gets right off?

A. That is right. Other times, much more time is spent.

Q. And, that was one of them?

A. That is right. [206]

* * *

Q. Well, in any event, after March 30th, nobody ever told you not to work on any Crook machinery, did they? A. No.

Q. And, as far as you are concerned you take it as it comes, whatever the man tells you to run, it doesn't make any difference where it came from?

A. That is right, as long as I am told to run it.

Q. And that has been going on since March 30, 1955?

A. That is right. That was even prior to March 30, 1955, too.

Mr. Nicoson: That is all.

(Testimony of Eugene Smedley.)

Redirect Examination

By Mr. Heimann:

Q. On that date, March 30th, Mr. Smedley, did you hear Mr. Ulibarri talk about his name change?

A. I don't recall of it, no.

Q. Were you standing near Mr. Mussro at the time, while he was out there?

A. Yes, I was in the near vicinity all the time.

Q. Now, you told Mr. Nicoson here, that the business agent not only checks the cards but listens to the men about their beefs and talks to them. When he does that, when he talked to a man, what do the others usually do?

A. Well the others are usually work, they are not all usually order to stop at the same time.

Q. I see. And, on that date, nobody was working while he was [207] there, is that right?

A. No one was working.

* * *

Q. You also told Mr. Nicoson that sometimes it takes less time and sometimes more time of the business agent. When does it take more time, usually?

A. Well, that depends on the union members themselves, as to what their particular gripes are, whether they have a long-winded one, or one that can be answered shortly.

Q. I see. How long does it usually take, when it takes longer? You said, ordinarily it takes ten minutes.

(Testimony of Eugene Smedley.)

A. That question is kind of hard to answer. That particular job had much more equipment on it than at other times. Like on a particular job spread, that time I was running two tournapulls on a job with five or six operators on the job.

I would say five or ten minutes on that particular amount of men.

* * *

Recross-Examination

By Mr. Nicoson:

Q. Mr. Smedley, don't some of the men go back to work, they went back to work while Mr. Mussro was still checking cards?

A. No, sir, I don't believe anybody did. [208]

Q. Didn't he tell them to go back to work?

A. No.

Q. What about this, don't you recall Mr. Mussro was parked in front of a piece of equipment, Mr. Ulibarri was supposed to operate and Mussro had to move his car so Mr. Ulibarri could go back to work?

A. Well, Mr. Mussro's car was parked behind one of the tournapulls and directly at the side of the road. Which he was facing into the tournapull, the rear end of his car was approximately ten feet from the edge of the paved road, that was running down there.

Q. So, he had to move it so the equipment could get to work?

A. He had to move the car? Not necessarily from any of the equipment, as I recall.

(Testimony of Eugene Smedley.)

Q. He had to move the car so the equipment could move? A. Yes.

Q. He did that? A. Yes.

Q. Let me ask you, to be sure you did. Did you just now ask, rather tell me, that Mr. Mussro didn't tell the people to go back to work, before he stopped checking the cards?

A. No, he didn't tell any of us to go back to work until just shortly prior to the time he left.

Q. I am going to ask you, if you didn't testify in the Federal Court, that you testified before Judge Yankwich, in [209] the case of "Yager vs. Operating Engineers" in Federal Court?

A. I was up there awhile.

Q. Well, you were on the witness stand?

A. Yes, I was.

Q. Mr. Heimann asked you some questions, Mrs. Selvin asked you questions. If, I suggest to you that was on Tuesday, July 12, 1955, would that sound right? A. That would sound right.

Q. That would sound right. Okay, were you there? A. Yes.

Q. I will ask you, that at that time you testified that Mr. Mussro had given permission to go back to work, before, while he was still checking the cards?

A. Yes, I believe I did testify to that effect.

* * *

Q. (By Mr. Nicoson): You testified to that?

A. That is, yes. Mr. Mussro checked the cards right up to the second he left the job.

(Testimony of Eugene Smedley.)

Q. And he had given permission to go to work while checking the cards?

A. Yes, just prior to the time he was checking cards a minute before he left. [210]

* * *

Trial Examiner: Did you hear any employees expressing griefs, with regard to Mr. Mussro on this?

The Witness: All of them had things to say to him.

Trial Examiner: On the job out there?

The Witness: Yes, at that time.

* * *

TONY DIAS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann: [211]

* * *

Q. How long have you been employed by Crowell & Larson? A. Year and a half.

Q. Now, on or about March 30th, you were on the Glendora job? Mr. Smedley and I talked about with you? A. I was.

Q. What was your job there? A. Foreman.

Q. When did you break for lunch that day?

A. 11:30.

* * *

Q. Now, did you see a Crook Company man get

(Testimony of Eugene Smedley.)

out there to the job on that day? A. I did, yes.

Q. And, did he work on the tournapull?

A. Yes. [212]

Q. And, did you see Mr. Mussro come out to the job? A. Yes.

Q. And what time did Mr. Mussro arrive?

A. Well, it was between five and ten minutes until 12:00.

Q. By the way, did you know Mr. Mussro? Did you know him before then? A. Yes, I did.

Q. Who is he?

A. He is the business representative of Local 12.

Q. And, you are a member of Local 12?

A. Yes.

Q. And, how long had the Crook Company man been there by that time?

A. Well, he had been there about ten minutes.

Q. All right. What did Mr. Mussro do when he arrived?

A. Well, he approached the job and he looked at the pick-up and asked what Crook Company was doing on the job. So, we told him what he was doing.

Q. All right, what did Mr. Mussro do then, if anything?

A. He walked over to where the mechanic was working on the tournapull.

Q. What mechanic?

A. I can't pronounce his name.

Q. The mechanic from Crook Company?

A. Yes. [213]

Q. Did you hear him talking to the Crook Com-

(Testimony of Tony Dias.)

pany mechanic? A. I did.

Q. What did he say?

A. When he first approached him, he asked his name and who sent him. Then, he also introduced himself, and asked him what he was doing; to which, the mechanic replied he was fixing, adjusting, the clutch on the tournapull.

Mr. Mussro told him, he ought to leave the job. He said, he wasn't going to leave until he finished the job he was sent out to do on that machine.

And, Mr. Mussro asked him again. The second time, he said, "he had better leave or we don't work." And, this mechanic continued to work. So, he took us on over by his car.

Q. All right. Did he say anything to you there?

A. Well, he first, he checked our cards, and——

Q. Let me interrupt you there. Did he say anything to you or to the other Crowell & Larson employees, before he took you over to the car?

A. Yes, before when he pulled us away from the tournapull, he was saying something about, "If we didn't know there was a picket line around Crook Company?"

Which I, and a couple of operators, said we didn't, which I didn't know there was at that time.

Q. Anything else? [214]

A. Well, he made the statement there, and asked if we didn't know it was wrong to have one of the Crook Company men to come out to do repairs on equipment that was entitled to our mechanics, of our own union to do.

(Testimony of Tony Dias.)

Q. Now, to whom did he say, "We just won't work"? A. To all of us.

Q. To all of you? A. Yes.

Q. Crowell & Larson employees? A. Yes.

Q. I see. All right then, he took you over to the car and checked the cards, right? A. Yes.

And, when talking, he said, "Talk a little more about the picket line and stuff like that." Then, he started checking our cards.

Q. Who talked about the picket line? Did the employees or Mr. Mussro?

A. Well, one question came from one, one from another. They wanted to know just what it was all about.

Q. I see. Now, how long did that card checking take?

A. Well, the card checking itself didn't take very long, it was just a matter of a few minutes. [215]

* * *

Q. (By Mr. Heimann): All right. When did Mr. Mussro leave?

A. He left, well, it was five minutes until one. Five or ten minutes until one, when he left.

Q. And, did he tell you at any time to go back to work?

A. Well, before he left he noticed the "pulls" were new and he wanted to know if—he asked me, if them "pulls" came through the picket line. I said, "I don't know." He said, "I want to get the serial numbers of them and find out if they came through

(Testimony of Tony Dias.)

the picket line. If they did, then I will come back and shut down tight."

But, up to that time he had never gave us word to go back to work.

Q. About what time was that?

A. Just before he left.

And, just before he got ready to leave, I made the statement, in a joking manner, I said, "Listen Joe, we got to work, we got to make a little money." Mr. Mussro replied, "You go ahead and tell your men to go back to work and I will find out if them machines came through the picket line. If they did, I will be back. If they didn't, I won't be back." [216] And, which he never returned.

Q. All right. Now, did you say, when you told him you had to earn a little money, that was a few minutes before he left?

A. Yes, just as he was getting in his car to leave.

Q. I see. Okay, now, did you make out a time card?

A. Yes, I did.

Q. You regularly make out time cards for the jobs for which you are foreman?

A. Yes.

Q. Will you tell us whether this is the time card you made out for that day?

A. Yes, it is.

* * *

Q. (By Mr. Heimann): Now, calling your attention——

Tell me first, in the first column, under employees names, certain names are there, will you tell us what these names are?

(Testimony of Tony Dias.)

A. They were the men working on the job.

Q. Next, comes a column with a lot of "9's" and a "7" too, what does that represent?

A. Well, the "9's" is the hours the men worked. The "1's" [217] is while we were down. That represents the ten hours for the day.

Q. You mean the one in the third column, that makes up the ten hours for the day?

A. Yes. The "7" in the first column, he worked two hours, prior to coming to my job.

Q. All right. Now, these "1's" in the third column, appearing under the heading "Union Shut Down, Down Time," now, who wrote this in that column? A. Gene Carpter.

Q. Gene Carper. Who is he?

A. Superintendent.

Q. After that it says, "Union shut down." Then the next work I believe it says, "Signed," by, "Tony Dias," who wrote that? A. I did.

Q. And who signed it? A. I did.

Q. And, that is indicated. What does that one hour indicate then?

A. That is when we were shut down for one hour.

Q. On account of what?

A. Well, our business agent told us we couldn't work, so we was idle for about an hour. [218]

(Testimony of Tony Dias.)

Cross-Examination

By Mr. Nicoson:

Q. Mr. Dias, I show you document which is in evidence as Board's Exhibit No. 4, this writing of the names here, in the left-hand column under, "Employees' Names," that is your handwriting, isn't it? A. That is my writing. [219]

Q. Isn't it a fact, you made these documents out full and complete before Mr. Carpter saw it?

A. I gave the men ten hours.

Q. You gave the men ten hours, in the first column?

A. Mr. Carpter came out and told me to change that to nine. He asked if our business agent, he asked, "He came out, I understand you were down for about an hour? Take it from ten and show the other column for one hour." He wrote that in himself. [220]

* * *

Q. So you all had lunch and went over and sat down, then he started the card checking?

A. Well, there was a little talk going on about picket lines before the card checking took place.

Q. You got in a general discussion amongst yourselves, didn't you?

A. Well, he was telling us about—— [221]

Q. Some people had heard about the picket line, some people hadn't? A. Yes.

Q. The men talked amongst themselves about

(Testimony of Tony Dias.)

the picketing line, what the problem was the Crook people were having, taking engineers on the job, all these things were discussed, is that right?

A. Right, yes.

Q. Now, you know Mr. Ulibarri, don't you?

A. Yes, I sure do.

Q. Sort of a long-winded individual?

A. Yes, at times.

Q. He talks about a great many things at considerable length? A. Yes.

Q. He did a lot of talking about things to Mr. Mussro that day? A. Yes. [222]

* * *

Q. Now, at any time, during the presence of Mr. Mussro, did you, as a representative of the company on the job, direct the men to go back to work?

A. When he left, yes.

Q. But not before? A. No.

Q. You could have done it, couldn't you? That would be part of your job as foreman?

A. Yes. [223]

* * *

Q. And, has anybody, since March 30th, refused to run one of the trucks?

A. Not to my knowledge.

Q. Has anybody prior to March 30th, refused to operate one of them?

A. Not as far as I know. [224]

* * *

(Testimony of Tony Dias.)

Redirect Examination

By Mr. Heimann:

Q. When did Mr. Carpter talk to you about that time card? A. About 3:20.

Q. Same day? A. Yes, same day.

Q. Now, did he ask you about the shut down? Did he ask you any questions about the shut down?

A. When he asked me if I had the time sheet made out, yes. I told him yes, it was in my car. I went over to get it, I handed it to him. He looked at it and he said, "I heard you had a little trouble with the union." That is when I went on to explain to him our business agent had been out and held us up for about an hour.

Q. Then he told you to change the '10's' to '9's'?

A. I proceeded to, he did it himself. I started to put it on my knee, then he changed it himself in the cab there in his pick-up.

Q. I see. Now, you told Mr. Nicoson, that the men talked [225] amongst themselves about the picket line? A. Yes.

Q. Did Mr. Mussro participate in that conversation? A. Yes, he did.

Q. He was part of the conversation all the while there?

A. Yes, he explained to use about it.

Q. I see. Now, you said Mr. Ulibarri asked Mr. Mussro a few questions about it? I didn't get, about what?

(Testimony of Tony Dias.)

A. About the picket lines, he asked about it.

Q. Then Mr. Mussro explained that to him, is that right? A. Yes.

Q. Did you hear Mr. Ulibarri talk about his name change? A. No, I didn't.

Q. Now, you said you intended to have the men to go back to work at 12:00 o'clock.

A. Yes.

Q. And you told Mr. Nicoson, during the time Mr. Mussro was there, you did not direct them to go back to work? A. No, I didn't.

Q. What was the reason?

A. When he told us to go back over to his car or he would shut it down.

Q. That is the reason? A. Yes.

Mr. Heimann: No further questions. [226]

Recross-Examination

By Mr. Nicoson:

Q. When Mr. Mussro was there, these men were asking questions; Mr. Mussro was trying to answer? A. That is right.

Q. And you had individual problems you wanted to talk over with Mr. Mussro too, didn't you?

A. Myself, no.

Q. Wasn't there some problem about your clearance? A. No, that was Weiss.

Q. Weiss was the man who had the problem about the clearance?

A. Yes, he was on an operator's card.

(Testimony of Tony Dias.)

Q. How long did the conversation about this Weiss clearance last?

A. Oh, just about five minutes. [227]

* * *

VALENTINE SANTILLAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. And, by whom are you employed?

A. Crook Company.

Q. What is your job there?

A. Mechanics helper?

Q. How long have you been so employed?

A. I would say approximately three and a half years.

Q. Now, on or about April 19th of this year, did you go to the Union Pacific Dock? [239]

A. I did, yes.

* * *

Q. And, did you go by yourself, or did somebody go with you?

A. No, I left the yard with Bill Soles, the mechanic.

Q. Came with you?

(Testimony of Valentine Santillan.)

A. Yes, we left in the pick-up truck from our Sheila Street Yard.

Q. All right. Now, what were you supposed to do at the Union Pacific?

A. Well, we were supposed to service some rollers, load them off flat cars and get them ready for delivery.

Q. For delivery to whom?

A. Well, one was to go to Paving Materials and another to Kirst Construction.

Q. Pardon me? A. Kirst Construction.

Q. Now, the one that was supposed to go to Paving Materials, were you supposed to take it out to Paving Materials?

A. No, the truck drive was supposed to come on truck and [240] load it up and take it out to his company.

Q. And, you were supposed to get it ready for him? A. Yes, that is right.

Q. All right. Now, when did you get to the Union Pacific dock?

A. Well, we arrived there, I would say, about 8:30 or a little before 9:00.

Q. And, were you followed on the way?

A. Yes, we were followed by a Mr.—by a blue Chrysler, say about a 1953.

Q. All right. And who was in the blue Chrysler?

A. Willis, I think that is his name anyway.

Q. Do you see him here in the hearing room?

A. Yes.

(Testimony of Valentine Santillan.)

Mr. Heimann: May the record show that the witness is pointing to my, not the next witness, the one after the next.

Q. (By Mr. Heimann): Had you seen him before anywhere?

A. Yes, I seen him several times on the picket line, directing pickets and following some of our employees, too.

Q. I see. Now, did he follow you all the way to the Union Pacific?

A. Well, no. When we thought we had left him on Grande Vista, because we turned off some other way; so, when we decided he wasn't with us any longer, we went ahead on to the Union Pacific docks, and a short while later, while we were servicing these [241] loaders, there he was.

Q. He was there? A. Yes.

Q. I see. Okay, what did you do when you got there?

A. Well, we went ahead and knocked out some blocks, serviced some rollers, started unloading on top of the dock.

Q. Now, where was Mr. Willis at that time?

A. Well, he was, I would say about fifty feet away from the dock.

Q. In his car? A. In his car, yes.

Q. What did he do, if anything?

A. Nothing, he just sat there and watched us, I guess.

(Testimony of Valentine Santillan.)

Q. Okay. Did the man from Paving Materials ever come?

A. Yes, I would say he arrived about 11:30, somewhere around [242] there.

Q. All right. Did he talk to you?

A. Yes he did. He asked me, if there was any union men around, and I said, there was, he was sitting right across the track there.

So, we went ahead and kept on working nothing stopped. The truck driver just stood there and watched us while we got; well, we had one roller in between the flat and the dock, and he was, we were having difficulty in getting it off the truck. So, he just stood there for awhile and watched us.

Q. All right. Go ahead and tell us what happened, then?

A. Well, we finally got it up on the dock. He decided he was going to talk to his boss about the union men.

* * *

Q. (By Mr. Heimann): The truck driver, what did he say?

A. Well, he said, he was going to take it so long as there was no picket line.

Q. All right. Then what happened?

A. I was going to get ready to roll the roller on his truck, he straightened it up along the side of the dock there.

I started to move the roller, when Mr. Willis went over to talk to the truck driver. So, I stopped what I was doing. [243]

(Testimony of Valentine Santillan.)

Q. You didn't hear what was said?

A. No, I didn't.

So, I just stopped what I was doing and stood and watched what was taking place.

So, a short while later, the truck driver came up and said he was going to call his boss and see if he should take the roller or not.

So, he made a phone call, then came back and said the boss said he should take it so long as there was no picket line.

So, when he came back from the phone call, he went over and talked to Mr. Willis there; and, a short while later, Mr. Willis and another fellow, they went to one of the cars.

Q. Who was the other fellow?

A. I don't know him.

Q. Not the Paving Materials man?

A. No, another union man.

Q. All right. Go on.

A. They went to one of the automobiles and pulled a couple of picket signs from the trunk and started picketing up and down along side of the dock.

So this truck driver said he couldn't take it seeing as how there was a picket line there.

So, I don't know what to do, so I started walking towards the railroad office. Mr. Jessie Sands stopped me. He worked for the Union Pacific Railroad. So, he asked me what the [244] trouble was, and I told him. He said, never mind, I will go get

(Testimony of Valentine Santillan.)

him to stop picketing here. They are not supposed to picket on railroad property anyway.

So, he went in the main office, he came out with some gentlemen; they talked to Mr. Willis and the other man with him.

And, so, short while later, they took the picket signs and put them in their cars and took off.

Q. Now, had the Paving Materials man left by that time?

A. Yes, I think he did. I am not sure now.

Q. Did he take the rollers?

A. No, he did not.

Q. Do you remember what was on the picket signs? A. No, I can't say for sure.

Q. And, how long had Mr. Willis and the other man carried those picket signs back and forth?

A. Well, it wasn't but a few minutes that they picketed back and forth.

Q. About how many minutes?

A. I would say about fifteen minutes.

Q. And where, just where, did they carry them?

A. Well, it was the right side of the dock there. Parallel with the dock, next to our equipment.

Q. I see. Next to your equipment?

A. Yes. [245]

Q. And the truck was, the Paving truck, where was that at the time?

A. That was right in the same place there.

Q. I see. Now, do you remember if the man from Paving Materials said anything else to you after the picket signs went up?

(Testimony of Valentine Santillan.)

A. Well, he just said that he couldn't take the roller because there was a picket sign and he was afraid of being black-balled that he had seen a lot of it happen and he just didn't want to get involved in it.

Q. All right. By the way, did you see that man in the hearing room?

A. The truck driver?

Q. Yes?

A. He is sitting in back of you there.

Mr. Heimann: May the record show, he will be my next witness. [246]

* * *

LOUIS L. VLASHART

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. (By Mr. Heimann): And, how many employees does Paving Materials have, approximately?

A. Oh, about, on and off, I would say about twenty-five.

Q. And, how many truck drivers?

A. Three.

Q. Now, on or about April 19th, did you drive a truck to the Union Pacific dock?

(Testimony of Louis L. Vlashart.)

A. I did.

Q. You have a trailer with you?

A. Yes.

Q. What were you to do at the Union Pacific dock? A. I was to pick up a roller.

Q. Do you know from whom?

A. No, I didn't know from whom it was supposed to have been at the docks, I guess it was Union Pacific docks at 7th and Alameda, around there.

Q. And, did you see the man there, how just testified?

A. The man who just testified, yes. [253]

Q. What were they doing when you got there?

A. Him and another fellow were trying to unload a roller off the flat car on the docks.

Q. By the way, what time did you get there?

A. Well, it was in the neighborhood, about 11:30 or 12:00. I didn't have no record of it.

Q. And, they were working on those rollers, you say? A. Yes, just the one roller.

Q. Okay. What were they doing?

A. Well they, it had slipped off the flat car, in between the dock and the flat car, they were trying to get it back on the flat car so they could get it in position to get it on the docks.

Q. What were you doing at that time?

A. I was just standing around, talking to them.

Q. All right. Did they get it back on the docks?

A. Well, finally, after they called some kind of

(Testimony of Louis L. Vlashart.)

crane truck, or something, they got it back on the dock. On a flat car, first.

Q. Then, on the dock?

A. Then, they readjusted their loading plates and loaded on the docks on its own power.

Q. What did you do then?

A. Well, I figured it was about ready to load, so I straightened up, pulled alongside the docks. I have a tilt bed trailer. I [254] have to tilt it down and set skids in order to roll this roller upon the trailer.

So, I pulled the truck up and got out of my truck. Then this representative, from Local 12, introduced himself.

Q. Did he give you his name?

A. Well, he did. I don't recall it. I seen one of the men that I think is sitting here, I don't know if it was that man that introduced himself.

Q. I see. He was there?

A. Yes, he was one of the representatives there at the time.

Q. I see. And, he is the one sitting next to Mr. Nicoson now?

A. That is right.

Q. Now, when they introduced themselves, did they say anything else? Did they say whom they represented?

A. Yes, he said he was a representative of Engineer's Local 12.

Q. All right. Did they say anything else to you?

A. He asked me if I knew anything about that roller being hot, and I told him, no I didn't know

(Testimony of Louis L. Vlashart.)

anything about it. And, he proceeded to tell me that they had a picket line down at Crook Company and it was hot, so they advised me to call my business agent at my local before I should proceed to load it, pick it up.

Q. Did you say anything?

A. Well, I told them, I believe it was at that time, I had [255] orders from my boss to load the roller if there was no union dispute or picket line, or anything around at the place I was supposed to pick it up.

Q. All right. Did you get any reply to that?

A. Well, didn't have a picket line there, so I thought I would call my boss to find out just what I should do, and I went over to the railroad station phone there and called him. And, he advised me, if there was no picket line there, to go ahead and load the roller.

So, then I came back to where these representatives of the union were sitting in their car, and I told them what my boss had told me, so they say, well, if that is the case, or something like that.

In the meantime, another fellow had driven up.

Q. Where?

A. Up to where this other car was.

Q. Another union representative?

A. I guess he was, I don't know. He was a union man.

One of them went over to him, the union man, and said something about taking the roller if there was no picket line.

(Testimony of Louis L. Vlashart.)

Q. That is what you said?

A. No, that is what he told this other union man.

He said, "Well, if that is all it takes, we'll put one up right now." So they proceeded to take the signs out of the car and walked in the vicinity of my truck and the dock there. [256]

Q. How many signs?

A. Two, I believe.

So, I went back and called my boss again and told him they had set up a picket line. So, he advised then to get in my truck and come on back in without the roller.

Q. All right. A. Which I did.

Q. What did you do then?

A. What did I do?

Q. Yes?

A. I came on back and got in my truck and went on back to the plant. [257]

* * *

Cross-Examination

By Mr. Nicoson:

* * *

Q. The first thing you did was to talk to the Crook man and find out whether there was any trouble?

A. We started a conversation and it led up to something. I don't believe, I think there was some dispute about the union before I even asked him if there was a union man around.

(Testimony of Louis L. Vlashart.)

Q. Well, this thing came up in carrying on a conversation while you were standing there talking to these fellows trying to get the roller back on the flat car? A. That is right.

Q. That is when he told you there were a couple of union men around there, is that right?

A. That is right.

Q. That is when you looked around and saw these union men sitting in the car? A. Yes.

Q. Did you go over and talk to them?

A. Not at that time, no. [259]

Q. Did you later go talk to them?

A. They approached me the first time. After I made my phone call, then I went back and talked to them. They were sitting in the car.

Q. That is when you told them that your boss told you that so long as there wasn't a picket line, it was all right to bring the roller home? That is when they said, if that is all they need, they pulled out picket signs and started picketing.

That is when you walked over and telephone your boss and said, "Well, now I got a picket line", and your boss said, "Come on home."

A. That is right.

* * *

WILLIAM C. WILLIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

Q. Will you state your name and address, please? [260]

A. William C. Willis, 3238 Mangum Street, Baldwin Park, California.

Q. What is your occupation, Mr. Willis?

A. Business representative for the International Union of Operating Engineers, Local Union No. 12.

Q. And, how long have you been business representative of that union?

A. Since May of 1941.

Q. Continuously? A. Right.

Q. Do you hold any other office in the union?

A. Yes, I am vice president of the organization.

Q. And, how long have you been vice president?

A. Well, for a period of approximately one year. [261]

* * *

MICHAEL S. BESSICH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. What is your occupation?

A. I am general manager of Crook Company.

Q. And what is your function as such?

A. Oh, to overlook the operations of the company.

Q. Well, would you tell us in a little more detail?

A. Well, to work hand in hand with the heads of the departments, the various departments and under Mr. Crook; the shop and parts department and the sales department.

Q. Are there any other departments?

A. Shop, parts, sales and accounting.

Q. Are they under your supervision, too?

A. Yes. [264]

Q. By the way, how long have you held that position, Mr. Bessich?

A. I have held that position since February 1, 1955.

Q. And prior to that time, were you with the Crook Company? A. Yes.

Q. In what capacity? A. As controller.

Q. And what was your position as controller?

(Testimony of Michael S. Bessich.)

A. Well, I was more concerned with finances and the accounting end of the company at that time.

Q. Now, would you tell us what kind of a company Crook Company is, and what kind of business it is in?

A. We are engaged in the sale and service of construction equipment.

Q. Is that retail or wholesale? A. Retail,

Q. And where do you get the equipment from?

Mr. Nicoson: Objected to on the ground that there is no proper foundation laid and secondly, it is immaterial, there being no allegation in this complaint as to——

Trial Examiner: I will overrule the objection. You may answer.

The Witness: I would say ninety to ninety-five per cent of our material comes from the middle western states, Ohio, Illinois, Wisconsin, Pennsylvania and that area. [265]

Mr. Nicoson: I move to strike it on the grounds that it is a conclusion and hearsay.

Trial Examiner: I will deny the motion.

Q. (By Mr. Heimann): Do you have anything to do with the sales of equipment by Crook Company?

A. Yes, I work with the sales manager and the salesmen on their prospective sales.

Q. And does every sale of equipment come to your attention, Mr. Bessich?

A. I would say every sale that there is any point in discussing will come to my attention. There may

(Testimony of Michael S. Bessich.)

be an occasional sale that is made, where there is no question of the equipment or of the credit standing of the company or things of that nature.

Q. I see. Now, does Crook Company sell any equipment outside the State of California?

A. Yes.

Q. And will you tell us the annual volume of sales of equipment outside the State of California, approximately?

Mr. Nicoson: That is objected to, first, on the grounds that there is no foundation having been laid; secondly, it isn't the best evidence and thirdly, it is hearsay, and immaterial, incompetent and irrelevant.

Trial Examiner: Is your question the annual sales outside of the State or for a particular year; which do you have in [266] mind?

Mr. Heimann: I asked for annual.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: Well, our sales annually out of State will vary. I do know that our sales annually out of State will be quite a bit in excess of \$50,000.00 per year.

Mr. Nicoson: I move to strike it as a conclusion on the part of the witness.

Trial Examiner: I deny the motion.

Q. (By Mr. Heimann): When you say, "quite a bit in excess of \$50,000.00 per year", is it in excess of \$100,000.00?

(Testimony of Michael S. Bessich.)

Mr. Nicoson: Objected to as leading the witness.

Trial Examiner: Overruled.

The Witness: Yes, it would be in excess of \$100,000.00.

Q. (By Mr. Heimann): All right and would you tell us what your annual volume of total sales is approximately, or in excess of a certain figure—my question includes sales within California and sales outside the State of California, Mr. Bessich?

Mr. Nicoson: Objected to, first, on the grounds of no proper foundation having been laid. It isn't the best evidence, it is hearsay and immaterial, incompetent and irrelevant.

Trial Examiner: Overruled. You may answer.

The Witness: Well, our total sales would be in excess of \$1,000,000.00 a year.

Mr. Nicoson: I move to strike it as a conclusion of the witness.

Trial Examiner: Denied.

Q. (By Mr. Heimann): And are you speaking now of equipment only or of equipment and parts?

A. Our total sales of equipment only would be in excess of \$1,000,000.00.

Q. And is that the equipment of which you testified that ninety to ninety-five per cent of it comes from the Midwest, Mr. Bessich?

Mr. Nicoson: Objected to on the grounds that it calls for a conclusion of the witness and it isn't the best evidence. No proper foundation has been

(Testimony of Michael S. Bessich.)

laid, and it is hearsay, and it is also irrelevant, immaterial and incompetent.

Trial Examiner: Overruled. You may answer.

The Witness: Yes.

Mr. Nicoson: I move to strike it as a conclusion of the witness.

Trial Examiner: Denied.

Q. (By Mr. Heimann): Mr. Bessich, have you within the last twelve months, had any election conducted by the National Labor Relations Board at your firm? A. Yes. [268]

Q. When was that election, approximately?

Mr. Nicoson: March 9, 1955.

The Witness: Yes, I believe that is right.

Mr. Heimann: I accept that stipulation and I don't think I have to ask any further questions on that.

I now ask the Trial Examiner and the Board to take judicial notice of Case No. 21-RC-3855, in which the Acting Regional Director certified on March 30, 1955, that Local 12 of the Operating Engineers is not the exclusive representative of all the employees and the unit defined in the agreement for consent election at Crook Company.

Trial Examiner: Very well. Is there any objection to that?

Mr. Nicoson: No objection.

Trial Examiner: All right.

Mr. Nicoson: I will even stipulate that there was a certification.

Mr. Heimann: The unit was all shop employees

(Testimony of Michael S. Bessich.)

who were in the employ of the employer during the payroll period ending February 15, 1955.

Trial Examiner: All right.

Q. (By Mr. Heimann): Mr. Bessich, have there been, within the last twelve months—has any picketing been conducted at the Crook Company?

A. Yes. [269]

Q. When did the picketing start?

A. Approximately February 17, 1955.

Q. And at what locations?

A. It originally started at our yard location, which is 4957 Shiela Street.

Q. And was there any other picketing at any other location, Mr. Bessich?

A. Oh, approximately one week or one and a half weeks later, the picketing was extended to the office and sales location at 2900 Santa Fe Avenue.

Q. Have the pickets been continuously at those locations since that time?

A. Well, there was a period of approximately one week or ten days, during the time that—or subsequent to the time that we consented to the election, up until the election was held at which time there was no picketing. And then recently the picketing has been, more or less, intermittent.

Q. I see. Now, in regard to that first interruption, round the time of the election, do you remember the exact dates when the pickets were removed and when they were restored?

A. I don't remember the exact date that they

(Testimony of Michael S. Bessich.)

were removed. It would have been the same day that we consented to the election.

Q. It would have been?

A. It was, I believe. [270]

Q. It was?

A. Yes, approximately a week before the election which was held on March 9th.

Mr. Heimann: Well, the record will show that the consent election agreement was approved on March 3rd.

Q. (By Mr. Heimann): And when did the pickets go back, with relation to the election?

A. Well, immediately upon the announcement of the results of the election, on the date of the election.

Mr. Heimann: The record will show that the election was held on March 9th.

Q. (By Mr. Heimann): And that was in the afternoon of the day of the election?

A. It was approximately 12:30 or 1:00.

Q. And the election was held when?

A. I think about 11:30 to 12:00, somewhere in there.

Q. I see. Do you know the wording of the picket signs, Mr. Bessich?

A. Well, they have been changed at—oh, I would say in the last month or last month and a half. Originally they were—the sign said something to the effect that, “Picket Non-Union” and then, “The Operating Engineers, Local 12”, on it.

It was later changed to say, “Crook Company

(Testimony of Michael S. Bessich.)

Unfair", and then it had, "Local 12, Operating Engineers", and then there was the Teamsters' Local mentioned on there. [271]

Q. * * * Are you familiar with the fact that on or about March 30th, an employee of yours by the name of Neuenschwander went to a job in Glendora, in order to repair a tournapull?

A. Yes.

* * *

Q. (By Mr. Heimann): Are you familiar with the manner in which the equipment came into the possession of Crowell & Larson?

A. Yes, I am.

Q. In what capacity did you receive that knowledge and how did you receive that knowledge?

A. Well, it was only a matter of three or four days prior to that, that I went out to their office with our salesman, who calls on them, and we made the deal.

Q. And what sort of a deal was it? [272]

A. It was a rental with the option to purchase.

Q. And do you know when it was delivered to Crowell & Larson?

A. Well, it was approximately the 29th or 30th of March, as I remember it.

Q. And was there any warranty connected with the lease of that equipment?

* * *

The Witness: Yes.

Q. (By Mr. Heimann): Did the warranty re-

(Testimony of Michael S. Bessich.)

late to the service or repair or both, of the equipment?

* * *

The Witness: Our warranty covers any malfunction or a breakage of parts or non-operation—anything that would cause non-operation of the equipment for a period of six months. [273]

* * *

DON C. MONTGOMERY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. And what is your occupation?

A. I am employed with the Shepherd Machinery Company.

Q. What is your position there?

A. Assistant general manager.

Q. How long have you held that position?

A. Approximately three years.

Q. And what was your position before then?

A. General office manager.

Q. Will you tell us your function as assistant general manager of Shepherd?

A. It is my responsibility to direct the various

(Testimony of Don C. Montgomery.)

activities and various departments of the company. [278]

* * *

Q. And who is your immediate superior?

A. Willard W. Shepherd.

Q. Is he the owner?

A. He is the general partner of the business, yes.

Q. Do you have the same departments and persons under your supervision as Mr. Shepherd, or do you divide the departments and functions between you? A. No, the same functions.

Q. Will you tell us what kind of company, Shepherd Machinery Company is?

A. It is a partnership.

Q. And what kind of business does it do?

A. Sales and service of construction and farming equipment, et cetera.

Q. Any particular brand?

A. Primarily Caterpillar and John Deere.

Q. When you say, "Sales", does that relate to retail or wholesale? A. Retail. [279]

* * *

Q. (By Mr. Heiman): And where do you get the machinery from?

A. Primarily from the Midwest, primarily from around Peoria, Illinois.

Q. Is that where the Caterpillars—where the Caterpillar factory is located? A. Yes.

Q. And you purchased it from the manufacturers; is that right? A. That is correct.

(Testimony of Don C. Montgomery.)

Q. Now, would you tell us what the annual volume of your purchases from Peoria, Illinois, will approximate?

Mr. Nicoson: That is objected to on the grounds, first there is no proper foundation laid, it isn't the best evidence, it is hearsay and calls for a conclusion of the witness and it is irrelevant, immaterial and incompetent.

Trial Examiner: Overruled. You may answer.

The Witness: We would purchase in excess of \$1,000,000.00 a year.

Mr. Nicoson: I move to strike it on the grounds that it is a conclusion of the witness.

Trial Examiner: Denied.

Q. (By Mr. Heimann): Does your answer relate to the purchases [280] from Peoria, Illinois?

A. Yes.

Q. And will you tell us approximately how much Shepherd sells annually outside the State of California?

Mr. Nicoson: That is objected to on the ground that no proper foundation has been laid and——

Trial Examiner: All right. I will sustain the objection.

Q. (By Mr. Heimann): Does Shepherd Machinery Company sell any equipment outside the State of California?

Mr. Nicoson: Same objection.

Trial Examiner: Overruled. You may answer.

The Witness: Yes.

Q. (By Mr. Heimann): Will you tell us ap-

(Testimony of Don C. Montgomery.)

proximately the volume of these out of State sales per year?

Mr. Nicoson: Objected to on the ground that no proper foundation has been laid. It isn't the best evidence, it is hearsay and calls for a conclusion of the witness, and it is irrelevant, immaterial and incompetent.

Trial Examiner: Overruled. You may answer.

The Witness: We would ship in excess of \$100,000.00 a year to outside the State of California.

Q. (By Mr. Heimann): Will you tell us what States? A. Well——

Mr. Nicoson: Objected to as immaterial.

Trial Examiner: I will sustain the [281] objection.

* * *

Mr. Heimann: I will ask the Trial Examiner and the Board to take judicial notice of Case No. 21-RC-2423, in which the Regional Director certified on June 23, 1952, that Local 12 of the Operating Engineers is not the exclusive representative of the employees of Shepherd Machinery Company and the unit found by the Board to be [282] appropriate.

* * *

Mr. Heimann: I am not through yet, although that will not obviate your objection.

The unit at that time, included all production, maintenance and repair and outside service employees, employed by the employer at the employer's 2757 Atlantic Boulevard location, at Los An-

(Testimony of Don C. Montgomery.)

geles, California, during the payroll period ending May 10, 1952.

* * *

Trial Examiner: I do not see that it establishes anything more than that Local 12 isn't certified. However, I will take notice of it, and I overrule the objection.

Mr. Nicoson: Then you will have to take notice of any subsequent action. You will have to see that the 1952 situation is up to date as of now, and what has happened in the interval. [283]

* * *

Q. (By Mr. Heimann): Mr. Montgomery, has there been any picketing at Shepherd's during the last twelve months? A. Yes.

Q. When did the picket start?

A. About May 23, 1955.

Q. Has it continued ever since?

A. Yes, intermittently.

Q. Always intermittently or—

A. No; rather continuously up until a couple of weeks ago.

Q. And then intermittently? A. Yes.

Q. Do you know what the picket signs read?

A. Initially they read, "This firm is unfair"—no, "This firm is nonunion," and I think was signed by the Operating Engineers.

There was a subsequent change, at which time the sign read, "Shepherd Tractor Company is unfair to organized labor," and was signed by the Operating Engineers and the Teamsters.

(Testimony of Don C. Montgomery.)

Q. Are you familiar with the fact that on or about April 22, [286] and 23 two employees of Shepherd in Lancaster went to a job in Creal, to repair one or more motor scrapers? A. I am.

Q. Are you familiar with the transaction regarding—was it one or two motor scrapers?

A. Two.

* * *

Q. (By Mr. Heimann): I am asking you in respect to whether the equipment came from Shepherd Machinery Company? [287]

A. Yes, the motor scrapers in question were TS.300 and they were from the Shepherd Machinery Company on rental, on a rental basis to Ralph Welker.

* * *

Q. Do you know when this equipment was leased to the Welker firm?

A. The two pieces went out at different times. The lease became effective on both pieces of equipment on April 11, 1955.

Q. Were they covered by your warranty? [288]

A. Yes, they were covered by a thirty-day warranty against defective parts or workmanship.

Q. Now, are you familiar with the fact that on or about May 24 an employee of yours by the name of Sterling went to a Stone Canyon job, for the purpose of making a repair on a D.8 caterpillar tractor? A. I am.

Q. Do you know whether that equipment came from the Shepherd Company? A. It did.

(Testimony of Don C. Montgomery.)

Q. And was it sold or leased to McCammon-Wunderlich? A. It was sold on a contract.

* * *

Q. When was it sold? A. March 1st.

Q. Was that covered by a guarantee or warranty? A. It was covered by warranty.

Q. For what period?

A. A six months' period. [289]

* * *

Q. (By Mr. Heimann): Mr. Montgomery, were there any negotiations with Local 12 during the last twelve months—between Shepherd and Local 12?

* * *

The Witness: Yes.

Q. (By Mr. Heimann): Did you participate in any of these negotiations? A. Yes.

Q. Would you tell us when these negotiations took place and with whom they took place and confine your answer to negotiations in which you participated, or occasions in which you participated in the negotiations?

A. The first contact with me was about January of this year by Mr. Willis of the Operating Engineers, and he called, according to his statement, to merely get acquainted and stated the fact that the union would like to establish a [290] contract with the Shepherd people and that they felt that the methods they had used in the past were not compatible with their present thinking.

(Testimony of Don C. Montgomery.)

And he left, stating that they would be in contact with us at some future date—nothing definite was mentioned. Next, we were contacted several times during—oh, I would say, March and April of this year—I think on each occasion Mr. Seymour and Mr. Bronson of the union came in.

Q. Do you know their capacities with the union?

A. Mr. Bronson is the manager, I think, of Local 12 and Mr. Seymour is his personal assistant.

Q. All right.

A. Or personal representative, I believe he signs his letters.

Q. All right.

A. And on these occasions, primarily was discussed the thought that the union should have a contract representing certain people in our business, certain people in our organization.

We were presented with a facsimile contract of, I believe it was Local 3, Operating Engineers, up in the San Francisco Bay region, and were told that that was merely an example of the type of contract that was negotiated in a shop operation such as ours.

Then we went through, perhaps one or two other similar [291] meetings and finally—I think it was the last time that Mr. Seymour and Mr. Bronson came out—they requested that we negotiate a contract with them and specifically stated that they would accept the same contract as they had previously submitted to us, the Local 3 contract.

Q. Was that the end of the negotiations?

(Testimony of Don C. Montgomery.)

A. Yes, that was the last negotiation we had. The next thing we know, there was a picket line established around the plant.

Q. Well, I believe you testified that they asked for a contract? A. Yes, they did.

Q. Well, what was Shepherd's answer to that?

A. Our answer was that we did not know whether or not they represented our people and we suggested that we should go to the National Labor Relations Board and have them conduct an election, to determine whether or not they represented our people.

Q. And is that how the negotiations broke off?

A. Yes, with a statement that no election was desired, as far as the union was concerned.

* * *

Q. (By Mr. Heimann): Have there been any subsequent demands for recognition by the [292] union?

* * *

The Witness: No.

* * *

Q. (By Mr. Heimann): Were you notified of the filing of any representation petition by union—well, let me ask it that way?

A. Are you referring to a National Labor Relations Board petition?

Q. That is right.

A. No, I don't know of any they filed.

(Testimony of Don C. Montgomery.)

Q. Did the company subsequently file any petition?

A. Yes, following the last session we had with Mr. Seymour and Mr. Bronson, in order to determine whether or not the union represented the employees, we filed a petition for an election with the National Labor Relations Board. [293]

Mr. Heimann: Now, I ask the Trial Examiner and the Board to take official notice of Case No. 21-RM-347 which was filed on April 8 and dismissed by the disclaimer of the union on April 15th.

Mr. Nicoson: No objection to that.

Trial Examiner: All right.

* * *

Q. (By Mr. Heimann): Now, after the dismissal of that petition, Mr. Montgomery, did the company file another petition? A. Yes, they did.

Q. Did you have anything to do with the filing of that petition?

A. It was filed at my direction.

Q. Will you give us the reason that you directed that to be filed?

* * *

The Witness: Our employees had received a mimeographed—I believe—invitation to attend a labor meeting at which time—this was at the invitation of the union, at which time they were to discuss representation and we felt that the union had no longer acted consistent with their [294] dis-

(Testimony of Don C. Montgomery.)

claimer, and that they had, that they did have an interest with our people.

And we felt we should determine that, so we instructed for the petition for election to be refiled.

Q. (By Mr. Heimann): At that time, did you receive any letter from the union?

A. We had a number of exchanges of letters, yes, and I believe it was about that time that we had an invitation by letter from the union, to meet with them and discuss an agreement.

Q. And was it subsequent to that time that you filed the new petition? A. Yes.

Mr. Heimann: I ask the Trial Examiner and the Board again to take official notice of Case No. 21-RM-350, filed May 15, withdrawn by the company upon disclaimer by the Operating Engineers, and the Teamsters, on May 20th, with withdrawal approved on June 15th.

Trial Examiner: Any objection?

Mr. Nicoson: No objection.

Trial Examiner: All right. [295]

* * *

JOSEPH A. MUSSRO

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nicoson:

* * *

Q. What is your business or occupation?

A. Business representative for the Operating Engineers, Local 12. [304]

* * *

Q. Did you have occasion to be on a job known as the Crowell & Larson job in Glendora?

A. I did.

Q. What time did you arrive at that job? [305]

A. It was approximately 11:30 to 11:45.

Q. Why did you go to the job?

A. I didn't go to the job deliberately, I was out on routine job checking.

Q. And you did that at the job?

A. Yes, after making other job checks in the area.

Q. Did you stop at the job?

A. I did stop at the job.

Q. What did you do after you stopped at the job?

A. On arrival at the job I noticed the members were eating lunch, with the exception of one. I don't know if he was our member or not. He was driving a water wagon.

(Testimony of Joseph A. Mussro.)

And after parking my car, I went over and I saw Crook Company truck there which was parked right near. I went over and asked the [306] mechanic——

* * *

Q. What question did you ask him?

A. How long he was going to be on the job.

Q. What did he say? A. Fifteen minutes.

Q. What did you say, if anything?

A. Nothing.

Q. What did you do then?

A. I went ahead and started making a routine job check, checking the members' cards, their dues, and so on.

Q. Now, there has been some testimony here by Mr. Neuenschwander that said he was the man of Crook Company that you talked to out there that day, and he testified that you told him either to get off the job or you would shut the job down. Did you have any conversation with him like that?

A. No.

Q. Did you make any such statement to him at that time? A. I did not.

Q. Or at any other time? A. No.

Q. Did you tell any of the persons employed on that job that they should stop work that day?

A. No.

Q. Nor at any other time? A. No.

Q. What did you do after you left this [308] mechanic?

A. I started making a routine job checking,

(Testimony of Joseph A. Mussro.)

checking cards and there was one member there that has been having a little trouble trying to change his name, which took up a little bit of my time. His name is Ulibarri and I was checking some of the cards of the other men while they were eating lunch.

Q. Now, how much time would you say that Mr. Ulibarri took up with you in the discussion of the name change?

A. Around fifteen to twenty minutes any way.

Q. And how many men did you check cards on that day?

A. I don't know; approximately seven or eight. I don't remember just how many it was because I do not have my list here.

Q. Ordinarily, how long would it take you to check the cards?

A. Well, it would depend upon that kind of a spread there would be, such as job elements. If the men were spread out over a big project, by the time you get from there to check the cards, well, it all depends on the spread.

This here, it happened to be that they were all in the one unit there, being at lunch time, as it was, with the exception of one water truck driver. I don't know how long it took me.

Q. Did these men have any questions to ask you that day? A. Yes.

Q. And did you attempt to answer them? [309]

A. I did.

(Testimony of Joseph A. Mussro.)

Q. Do you recall any of the questions that were asked you and any of the answers you gave?

A. Yes.

Q. Will you tell us about that?

A. I remember one of them. The member said that—I don't know his name—let us see—what was his name, Smedley or something like that—Smedley said—rather, he asked me, “Do we still have a picket line on Crook Company?”

And Dias also asked me about the same questions, and I don't remember what I answered, whether I answered “yes” or “no,” because I was talking to Ulibarri and I was concentrating on his problem, more so than on anything else.

Q. Did you tell any of the employees of Crowell & Larson that day that they should quit their work so long as the Crook Company truck was there?

A. No, I did not.

Q. Did you tell any of them to quit work at all that day?

A. I did not tell anybody to quit work.

Q. Did you say this, in substance, to Mr. Smedley and Mr. Dias, that you were going to take the serial numbers of the truck and if you found out it did come through a picket line, you were going to shut the job down? A. No, I did not.

Q. Did you say anything in that respect? [310]

A. No, but I did take serial numbers of two pieces of equipment.

Q. What time did you leave the job that day, if you left?

(Testimony of Joseph A. Mussro.)

A. Somewheres around—some time between 12:15 to 12:30, around there, I would say.

Q. Around 12:15 to 12:30?

A. I don't remember just exactly what time it was because I did have another appointment at Pacific Colony for 1:00.

Q. Where is Pacific Colony?

A. On Valley Boulevard, which is west of Pomona.

Q. Pomona, California? A. Yes.

Q. About how many miles?

A. I don't know, I would say it was between seven and eight miles, or something like that.

Q. What time was your appointment at this Pacific job? A. 1:00.

Q. Were you there on time?

A. I was. It was somewheres between 1:00, possibly a little before, because it was in around 1:00, right there, because when I got there, I remember talking to an electrician whom I knew, if he saw Mr. Stroner who I had an appointment with.

Q. How long were you on the Crowell & Larson job all told?

A. I would say somewheres around half an hour approximately any way, about half an hour [311] or so.

* * *

(Testimony of Joseph A. Mussro.)

Cross-Examination

By Mr. Heimann:

Q. Mr. Mussro, at the time you went to that job, the Crowell & Larson job, did you know what the employees' lunch hour was?

A. No, I did not.

Q. And you arrived there about 11:30 or about 11:45? A. I did.

Q. Did you ask any one—or let me ask you this: When you got out there, you saw the Crook Company truck there? A. Right.

* * *

Q. (By Mr. Heimann): Do you remember that you gave a statement to one of the investigators of the National Labor Relations Board?

A. Yes.

Q. And that you signed that statement?

A. I did. [312]

* * *

Q. Did you state to the Field Examiner—I withdraw the question. I will ask it again.

Did you state to the Field Examiner the following: [313] "To make this entirely complete, I will add that when I came onto the job and saw the Crook Company truck, I asked one of the men where the Crook Company man was and he pointed out the man to me"?

Mr. Nicoson: The question is, did he say that to the Field Examiner?

(Testimony of Joseph A. Mussro.)

Mr. Heimann: That is right.

The Witness: No.

Q. (By Mr. Heimann): Would you read this—strike that, please.

Did you read this affidavit before you signed it?

A. I read it hastily because I had another appointment. I don't know whether it was under oath or not.

* * *

Q. (By Mr. Heimann): Will you read the first line of your statement? A. Yes. [314]

Q. Was that there when you signed it?

A. Yes, I believe it was.

Q. And you read it? A. Yes.

Mr. Heimann: Well, I now would like to read from that document that first line, which reads: "I, Joseph A. Mussro, being duly sworn, [315] state"——

* * *

Q. Now, you are a business agent of Local 12, isn't that right? [317] A. I am.

Q. Isn't it your job to enforce union rules?

A. It is.

Q. Isn't it your job to see that union men do not work with nonunion men?

A. It isn't our job to take and go out and make an issue. I would like to say this in my own way, if you don't mind.

There are times that we make leniencies for harmony and complete friendship and sometimes we

(Testimony of Joseph A. Mussro.)

may enforce an issue and sometimes we do not enforce an issue. It all depends. [318]

* * *

Q. And your arrival was at approximately 11:30 or 11:45?

(No response.)

Q. Isn't that what you said?

A. When I arrived where?

Q. At the Crowell & Larson job.

A. That was after 11:30; between 11:30 and 11:45.

Q. That is what I said. So, you were on that job approximately one hour, were you not?

A. I wasn't.

Mr. Heimann: I see. Well, I will let the record stand.

Q. (By Mr. Heimann): And during that time, whatever amount of time it was you were there, you checked about seven or eight cards?

A. I did.

Q. Now, ordinarily when you check cards, isn't it true that you check the card of one employee at a time? A. That is right.

Q. And the others can go on working?

A. That is right. [320]

Q. Now, Mr. Nicoson asked you how long it would take ordinarily to make your check of seven or eight cards and you said it depends on how much the job is spread out? A. That is right.

(Testimony of Joseph A. Mussro.)

Q. Now, at that particular time, the employees were all standing around you, were they not?

A. With the exception of one man, who was out on a water wagon.

Q. Now, how long does it ordinarily take you to check seven or eight cards of men who are bunched together with one exception?

A. It is hard to say because maybe one may have one or two questions and in this case here, they were eating lunch. I don't know how long it took me to check their cards.

Q. Now, some employees asked you questions about the picket line at Crook; is that right?

A. One did.

Q. And you said that was——

A. Smedley.

Q. Smedley? A. Yes, and possibly Dias.

Q. Possibly Dias did, too? A. Yes.

Q. Isn't it a fact that you mentioned the picket line at Crook first? [321] A. No.

* * *

Q. Well, do you remember who was the first one who brought it up? A. No, I do not.

Q. But it would have been either Smedley or Dias? A. It was either one of them.

Q. Do you know in response to what, if anything, they brought up the Crook Company picket line? A. No, I have no idea.

Q. No idea what brought it up?

A. It was possibly—it might have been possibly

(Testimony of Joseph A. Mussro.)

in reference to—because Smedley said something about the two pieces of equipment coming from another job and he didn't know how they got there on the job at Puente. [322]

* * *

Q. Now, you stated that you took the serial numbers of two pieces of equipment down; is that right? A. I did.

Q. What equipment was that?

A. Two tournapulls.

Q. And where did those two tournapulls come from? A. I don't know.

Q. And for what purpose did you take down the equipment number? A. Just hobby.

Q. Just hobby? A. That is right.

Q. Is it your hobby to take down equipment numbers?

A. I like taking down equipment numbers, yes. [323]

Q. Pardon?

A. I do take down equipment numbers.

Q. It is a hobby with you?

A. Yes, it is hobby with me.

Q. For no other purpose whatever?

A. None whatever.

Q. Now, how many pieces of equipment were on that job? A. I don't know.

Q. Were there more than two?

A. There were more than two, yes. I didn't count the equipment on the job.

(Testimony of Joseph A. Mussro.)

Q. But you only took the numbers from the two tournapulls; is that right?

A. That is right.

Q. And were you going to check those numbers anywhere?

A. No. [324]

* * *

JAMES LUTHER

a witness called by and on behalf of the respondent,
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Nicoson:

Q. Will you state your full name and address
for the record, please?

A. James Luther. [326]

* * *

Q. When—you were employed by McCammon-
Wunderlich on May 23, 1955?

A. Yes.

Q. At the Stone Canyon job?

A. Yes.

* * *

Q. Did anything happen that morning before
you went to work? [327]

A. Yes.

Q. What time do you usually go to work?

A. 4:00.

Q. In the morning?

A. Yes.

Q. And what happened there at 4:00 in the
morning?

(Testimony of James Luther.)

A. Well, some of the fellows got together and had a little talk.

* * *

Q. Go ahead then and tell us what happened?

A. Some of the fellows got together and were talking about another fellow, a union member, who had been fined the week before for crossing the picket line and so we, more or less, decided among ourselves if any of the—— [328]

* * *

Trial Examiner: Go ahead and tell us what took place among yourselves. This is on the morning of May 3rd. You had a discussion, I take it, from what you have already told us?

The Witness: Yes.

Trial Examiner: And what was the subject of discussion then?

The Witness: Well, it was of nonunion members coming in and working on the equipment, on our job and we decided [329] among ourselves, the next time they showed up on the job, that we would, more or less, go and get a drink of water until they left.

* * *

Q. (By Mr. Nicolson): How many of the McCammon-Wunderlich employees were there when this thing happened?

A. You mean when we were talking?

Q. Yes.

A. Oh, I would say in the neighborhood of ten.

(Testimony of James Luther.)

Q. Were there more came up as the conversation was developing? A. Well, yes.

Q. After that you went to work, did you?

A. Yes.

Q. Later that morning, did you see a truck from the Shepherd Tractor Company come on the job? [330] A. Yes.

Q. What happened then?

A. Well, different members gave the signal among themselves to just pull up and go over and park.

Q. Is that what happened?

A. Yes, we all, more or less, stopped.

Q. What did you do?

A. I stopped and parked my rig where I was.

Q. Getting off of it? A. Yes.

Q. And standing by? A. Yes.

Q. How long a time did they stay there?

A. Twenty to thirty minutes.

Q. Did you then go back to work?

A. Yes.

Q. When did you go back to work?

A. When we saw the truck leave.

Q. When you saw the truck leave?

A. Yes.

Q. When you were together there that morning—strike that. Do you know a fellow by the name of “Red Hunter”? A. Yes.

Q. Does he work out there on the job?

A. Yes. [331]

(Testimony of James Luther.)

Q. Was he present when you were having this discussion at 4:00 in the morning?

A. No, he wasn't.

Q. Do you know how many pieces of equipment stopped that morning when the Shepherd truck showed up?

A. I would say eighteen to twenty.

Q. Eighteen to twenty? A. Yes.

Q. Now, had you been instructed or advised or directed by any representative of Local 12 to take this action? A. No, sir. [332]

* * *

RAYMOND L. THOMASON

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nicoson:

Q. Will you state your full name for the record?

A. Raymond L. Thomason.

Q. And what is your address?

A. 13364 Pinney Street, Pacoima.

Q. And what is your business or occupation?

A. Heavy duty operator.

Q. Were you so engaged on May 23rd, 1955?

A. I was.

Q. By whom were you employed on that date?

A. McCammon-Wunderlich. [343]

* * *

(Testimony of Raymond L. Thomason.)

Q. Did anything hapen there that morning, before you went to work? A. Yes.

Q. Who was there when this thing happened?

A. Well, just the operators themselves.

Q. The men on the job? A. Yes.

Q. Working equipment like you? A. Yes.

Q. About how many of them would you say were there? A. Between eight or ten.

Q. Between eight or ten? A. Yes.

Q. Tell us what happened that morning?

A. We were all gathered around before work time and we decided we were not going to work with a nonunion member on the job, if one of them was to come on the job. If that happened, we were all going to shut down, go for a drink of water or do something else.

Q. Was Mr. Hunter there when this incident happened? A. No.

Q. Was any representative of the union present when this thing happened? A. No. [345]

Q. Then what did you do?

A. We went to work.

Q. Did you notice later on that day, a Shepherd truck being on the job? A. Yes.

Q. When did you first notice it?

A. Oh, I would say around 9:30.

Q. Where did you notice it?

A. Coming across the fill.

Q. That would be on the same job where you would have to take your load up, dump it and pass it; would that be right? A. Yes.

(Testimony of Raymond L. Thomason.)

Q. What did you do when you saw the Shepherd truck? A. I pulled in and parked.

Q. Pulled in where? A. On the ramp.

Q. On the ramp? A. Yes.

Q. Going up or coming down?

A. Coming down.

Q. You had already dropped your load?

A. Yes.

Q. How long were you there?

A. Oh, approximately twenty to thirty minutes.

Q. Did other employees do the same thing as you did? [346] A. Yes.

Q. And did you go back to work that day?

A. Yes.

Q. When did you go back to work?

A. After the truck left.

Q. Did anybody tell you to go back to work?

A. No. [347]

* * *

Trial Examiner: I understand you have arrived at a stipulation concerning a communication from Local 12?

Mr. Nicoson: That is correct, your Honor. We are prepared to stipulate that there was such a document written by Mr. McNeel, addressed to the Board, in connection with certain representation cases which were on file with the Board, and the hearing has been held with respect to those cases.

And on page, I believe it is 41 of the transcript of that, [355] there is a verbatim reading of the contents of the so-called disclaimer letter.

Mr. Heimann: Pages 38 to 39.

Mr. Nicoson: Pages 38 to 39—which we would like to read into the record.

Trial Examiner: All right, but give us the case numbers, too.

Mr. Nicoson: Yes.

Mr. Heimann: The name of the case is Casey-Metcalf Machinery Company, etc., and International Union of Operating Engineers, Local No. 12, A. F. of L., etc., 21-RM-351, etc., date of transcript is June 23, 1955.

I will stipulate further, at the request of Mr. Nicoson, that that document went into evidence as Board's Exhibit No. 2-A and was a letter dated May 17, signed purportedly by H. M. McNeel, with a small letter "a" by the signature, addressed to the National Labor Relations Board at 111 West Seventh Street, Los Angeles 14, California, attention Louis Gordon, Field Examiner.

And I am quoting from that letter now:

"Re Shepherd Machinery Company, Case No. 21-RM-350, Casey-Metcalf Machinery Co., Case No. 21-RM-351; Crook Company, Case No. 21-RM-352; Electric Tool & Tool & Supply Company, Case No. 21-RM-353; George M. Philpott Company, Inc., Case No. 21-RM-354; Shaw Sales & Service Company, Case No. [356] 21-RM-355; Smith-Booth-Usher Company, Case No. 21-RM-356"; and that letter stated:

"We wish to inform you that the International Union of Operating Engineers, Local No. 12,

doesn't have claim to represent a majority of the employees in the units set forth in the above petitions."

That is followed by the purported signature of H. M. McNeel, International Labor Relations Representative, International Union of Operating Engineers, Local Union No. 12?

That is the end.

Trial Examiner: All right. That is your stipulation.

Mr. Nicoson: That is the stipulation.

Trial Examiner: Very well.

Mr. Nicoson: Mr. McNeel.

HAROLD M. McNEEL

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Nicoson:

* * *

Q. What is your business or occupation?

A. I am assistant manager of Local 12 and Labor Relations [357] representative.

Q. How long have you held that position?

A. About six years.

Q. You just heard the stipulation read here into the record or a letter signed by Mr. H. M. McNeel?

A. Yes.

Q. Are you the same Mr. McNeel?

A. I am the same one.

(Testimony of Harold M. McNeel.)

Q. And you signed such a letter?

A. No, I was at San Diego that day and I had my secretary send the letter out.

Q. It was sent under your direction?

A. Yes, it was sent under my direction.

Q. What are your duties, Mr. McNeel?

A. Well, I have charge, and I am responsible for, all contracts, some two thousand of them, and also negotiations, handling of Board work and State compensation.

Q. By "Board," you mean National Labor Relations Board?

A. National Labor Relations Board, yes, and State Boards.

Q. Now, do you also have anything to do with the general labor relations picture of Local 12?

A. I do. [358]

* * *

Q. (By Mr. Nicoson): Now, there is some evidence in the [359] record here, Mr. McNeel, that a consent election was held among the people of Crook Company on March 9th, 1955; that the union lost the election and directly after that started another picket line? A. That is true.

Q. Do you know why that picket line was established? A. Yes.

Q. Will you tell us why?

A. That one was established and charges were filed that the men had been discharged for union activity. Later, after the election, it was put back on again and that was for the purpose of recogni-

(Testimony of Harold M. McNeel.)

tion or recognizing the fact that these nonunion mechanics were doing the work that has been awarded by the American Federation of Labor, to the Operating Engineers.

And that is, that the Engineers shall repair and maintain all the equipment that they operate. [360]

* * *

Q. And you are still maintaining the picket line at Crook Company? A. Off and on, yes.

Q. And for the same purpose? A. Yes.

Q. Do you have a picket line at the Shepherd Machinery Company? A. Occasionally.

Q. Do you know when that was established?

A. I could not give you the date, no.

Q. Do you know why it was established?

A. Yes.

Q. Why was it established?

A. For the same reason that we established the later picket line at Crook Company. [361]

* * *

Cross-Examination

(Continued)

By Mr. Heimann: [362]

* * *

Q. (By Mr. Heimann): Mr. McNeel, isn't it a fact that the picket line at Crook Company started in February?

A. Well, I don't remember definitely, no, when it started.

(Testimony of Harold M. McNeel.)

Q. Isn't it a fact that the picket line at Crook Company started long before the discharges of these ten men? A. No, I believe not.

Q. By the way, do you know whether these ten men were discharged, laid off, or what?

A. They were discharged.

Q. I see. And how do you know that?

A. That is what they said.

Q. That is what who said?

A. The men themselves.

* * *

A. There was a letter that Crook gave to them, stating that [363] they were being let go. I don't know whether it was laid off or what.

Q. You don't remember whether it said discharged? A. No.

Q. Let go or what it said?

A. They were letting them go, I think.

Q. Something like that?

A. Yes, something of that order.

Q. Now, when the consent election agreement and that "RC" case was approved, the picket line went off, is that right, Mr. McNeel?

A. I don't know.

Q. There was a consent agreement?

A. Yes.

Q. And the picket line was removed?

A. Yes.

Q. And it went back as soon as the election results were known? A. That is right. [364]

* * *

(Testimony of Harold M. McNeel.)

Redirect Examination

By Mr. Nicoson:

Q. You said that the picket line, in answer to Mr. Heimann's question, was for the purpose of recognition of what?

A. Well, the union, to bring to the attention of all of the construction industry that the Crook Company, the Shepherd Company, and the others were employing nonunion men on our work, work that was assigned to us, to our jurisdiction. [365]

* * *

W. G. CROOK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. And are you the owner or principal stockholder or partner of Crook Company?

A. I am the principal stockholder.

Q. And do you have anything to do with the management of Crook Company?

A. Yes, sir, I do.

Q. You are the top boss; is that right?

A. That is right.

Q. Now, are you familiar with the fact that on

(Testimony of W. G. Crook.)

or about May 17, the Operating Engineers, Local 12, filed a disclaimer as to your employees?

A. Yes, I am aware of that fact. [370]

Q. Did you have any sort of communication from that union after that?

A. I had one call.

Q. Approximately when was that?

A. Approximately one week or ten days after the disclaimer.

Q. Who called you?

A. A gentleman named "Mr. Seymour."

Q. And what did he say?

A. He asked to make an appointment to meet me in the field.

Q. What did you say?

A. I asked him the nature of the business and he stated he would like to make an agreement with us and a contract as to our labor situation.

Q. And what did you say?

A. Well, I told him that, under the circumstances, that we had had an election, that I did not see it would be possible for us to enter into any agreement with the organization as I understood it was illegal after the employees had voted against the union. [371]

* * *

MICHAEL S. BESSICH

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Heimann:

* * *

Q. On or about May 12th, did you receive a letter from the Operating Engineers and/or Teamsters? A. Yes.

Q. Do you have that letter with you?

A. No, I don't.

Q. Do you know what happened to that letter?

A. Yes.

Q. Will you tell us what happened to it?

A. Well, it was submitted as an exhibit in a representation hearing which we had here, approximately one month ago. [372]

* * *

Q. (By Mr. Heimann): Mr. Bessich, there has been testimony that some ten of your employees were discharged or laid off, approximately at the time of the election—I forget the date—do you know of any layoffs or discharges? [373]

* * *

The Witness: Yes, I gave the date. I did not give an approximate date. [374]

* * *

Q. (By Mr. Heimann): Will you tell us approximately when they were made?

* * *

(Testimony of Michael S. Bessich.)

The Witness: The layoffs were made effective February 15, 1955. [375]

* * *

Q. (By Mr. Heimann): Now, were these men whose employment was severed in February, 1955, were they discharged or laid off?

A. They were laid off.

Q. Did they vote in the election?

* * *

The Witness: Yes, they were permitted to vote.

Q. (By Mr. Heimann): Did the company challenge them? A. No.

Q. Has re-employment been offered to any of them?

A. Not until just recently, and we did offer—we have openings for possibly two men at the present, of which we have [376] made an offer to them to come in and discuss the possibility of going back to work.

Q. I see. And approximately when was that?

A. Actually I wrote them letters [377] yesterday.

* * *

Mr. Heimann: Mr. Examiner, I have had marked for identification as General Counsel's Exhibit No. 7, a copy of a letter on the stationery of the International Union of Operating Engineers, addressed to Shepherd Tractor & Equipment Company, dated May 11, 1955.

I offer to stipulate that the original of that letter

was sent to Shepherd Tractor & Equipment Company and that another letter was sent to Crook Company, identical in all respects, except that it was addressed to Crook Company instead of Shepherd.

Also, that the original was signed by Mr. Seymour for the Operating Engineers, Local 12, and by Mr. Hatfield and Mr. Backus for Teamsters Local No. 495.

Mr. Nicoson: And will you accept the further stipulation that at or about the date shown on that, identical letters, with the exception as to the firm or person to whom it was addressed, were also sent to Casey-Metcalf Machinery, Electric Tool & Supply Company, George M. Philpott Company, Inc., Shaw Sales & Service Company, Smith-Booth-Usher Company, Brown-Bevis-Industrial Equipment Company, and as Mrs. Selvin has already pointed out, in the off-the-record discussion, they were also equipment dealers.

Will you accept that as part of the [398] stipulation?

Mr. Heimann: As to that, Mr. Examiner, I am willing to stipulate to the fact as related by Mr. Nicoson. However, I do not see the relevancy and I, therefore, object to its admission in evidence.

Trial Examiner: What difference does it make from your standpoint?

Mr. Nicoson: He has been arguing to show here that we are trying to obtain recognition from these two people. I am trying to show that we are not, that we have invited certain people to attend a

group meeting, for the purpose of discussion but not in an individual capacity.

Trial Examiner: I guess I had better look at that letter, Mr. Nicoson.

Mr. Nicoson: That is why I was so interested about the language of it.

Mr. Heimann: I want to say something about that, too, then.

Trial Examiner: Well, you have arrived at a stipulation, haven't you?

Mr. Heimann: He has not accepted it yet.

Trial Examiner: So far as the facts are concerned, the stipulation is accepted.

Mr. Heimann: Just for the record, do you join in the stipulation?

Mr. Nicoson: Yes, certainly. [399]

Mr. Heimann: All right.

Trial Examiner: I will admit the stipulation and consider it in respect to your argument, as to the attempt by the union to obtain recognition through the unlawful means; your argument being that it was a different situation and the fact that a number of equipment dealers were invited to attend this meeting tends to negate the inference that the General Counsel made.

Mr. Nicoson: That is it, that is right, that is the idea.

Mr. Heimann: We previously read into the record the union's disclaimer.

Trial Examiner: Yes.

Mr. Heimann: I think we named all the com-

panies that that disclaimer referred to, and I think those are the identical companies that Mr. Nicoson just mentioned.

Mr. Nicoson: That was my intention, yes.

* * *

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.) [400]

GENERAL COUNSEL'S EXHIBIT No. 7

(Copy)

International Union of Operating Engineers

May 11, 1955.

Shepherd Tractor & Equipment Co.,
Atlantic & Bandini Blvds.,
Los Angeles 22, Calif.

Dear Sirs:

During the past several months, we have at various times, attempted to arrange a meeting with the Equipment Distributors in Southern California, for the purpose of discussing an Agreement between your firm and the below signatory Unions.

The Operating Engineers, in handling the procedures, have been advised by Mr. W. W. Shepherd of the Shepherd Machinery Company that he, Mr. Shepherd, had been delegated by the various firms to speak for them. In discussing this issue with

Mr. Shepherd, it was evident that we could not proceed and enter into negotiations.

We are, therefore, requesting that a representative of your Company be present May 16, 1955, at 10:00 a.m. at the Operating Engineers' Building, 2323 West 8th Street, Los Angeles, California, for the purpose of entering into negotiations with the Unions involved to conclude a workable Agreement. The Unions will have a proposal to offer at this meeting.

Sincerely,

R. B. BRONSON,

Business Manager, International Union of Operating Engineers Local Union No. 12.

By /s/ J. H. SEYMOUR,

Personal Representative to
R. B. Bronson.

TEAMSTERS' AUTOMOTIVE WORKERS
LOCAL UNION No. 495,

By,

FRANK HATFIELD,

Secy.-Treasurer;

.....,

TOM BACKUS,

President.

Received in evidence July 28, 1955.

* * *

In the United States Court of Appeals
for the Ninth Circuit

No. 15151

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12,

Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board, Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "International Union of Operating Engineers, Local 12, and Crook Company," Case No. 21-CC-198; and "International Union of Operating Engineers, Local 12, and Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company," Case No. 21-CC-200, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on July 25, 26, 27 and 28, 1955, together with all exhibits introduced in evidence.

2. Stipulation, dated August 16, 1955, among the parties correcting transcript of testimony, and made a part of the record herein.

3. Copy of Trial Examiner's Intermediate Report and Recommended Order (annexed to item 6 hereof) and order transferring cases to the Board, both issued September 7, 1955, together with affidavit of service and United States Post Office return receipts thereof.

4. Respondent's exceptions to the Intermediate Report and Recommended Order received by the Board on October 3, 1955.

5. General Counsel's exceptions to the Intermediate Report and Recommended Order received by the Board on October 3, 1955.

6. Copy of Decision and Order issued by the National Labor Relations Board on January 9, 1956, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being there-

unto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 10th day of July, 1956.

[Seal]

NATIONAL LABOR RELATIONS BOARD,

/s/ FRANK M. KLEILER,

Executive Secretary.

[Endorsed]: No. 15151. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Union of Operating Engineers, Local 12, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed July 11, 1956.

/s/ PAUL P. O'BRIEN.

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Union of Operating Engineers, Local 12, Los Angeles, California, its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "International Union of Operating Engineers, Local 12, and Crook Company," Case No. 21-CC-198; and "International Union of Operating Engineers, Local 12, and Willard W. Shepherd and Norma D. Shepherd, d/b/a Shepherd Machinery Company," Case No. 21-CC-200.

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on January 9, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, representatives, agents, successors, and assigns to comply therewith.

Dated at Washington, D. C., this 1st day of June, 1956.

NATIONAL LABOR RELATIONS BOARD,

By /s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed June 4, 1956.

[Title of Court of Appeals and Cause.]

On Petition for Enforcement of an Order of
National Labor Relations Board

ANSWER OF RESPONDENT, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
LOCAL NO. 12, AFL.

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

Comes now the International Union of Operating Engineers, Local No. 12, AFL, Respondent, for itself and no other, and files this, its Answer to the Petition for Enforcement of an Order of the National Labor Relations Board, and denies, admits and alleges as follows:

I.

Answering Paragraph I of the Petition for Enforcement of the Order of The National Labor Relations Board, the respondent, International Union of Operating Engineers, Local No. 12, AFL, admits that respondent is a labor organization engaged in promoting and protecting the interests of its respective members in the State of Cali-

fornia, and that it is within the judicial district of this honorable court, but denies that unfair labor practices involving this respondent occurred within this judicial circuit or within any other judicial circuit. Respondent International Union of Operating Engineers, Local No. 12, AFL, admits that this Court has jurisdiction under Section 10-E of the National Labor Relations Act, as amended, to review purported orders of the National Labor Relations Board.

II.

Respondent International Union of Operating Engineers, Local No. 12, AFL, admits that on January 9, 1956, the National Labor Relations Board stated its Findings of Fact and Conclusions of Law and issued a purported order directed to Respondent, its officers, representatives, agents, successors and assigns. Respondent International Union of Operating Engineers, Local No. 12, AFL, further admits that a copy of said decision and purported order was served upon Respondent Union Local No. 12 on or about the same date.

III.

Respondent International Union of Operating Engineers, Local No. 12, AFL, for itself and no other, answering Paragraph III of the Petition of the National Labor Relations Board to enforce its order, states that it has no knowledge that the National Labor Relations Board is certifying and filing with this Honorable Court a transcript of the entire record of the consolidated proceedings before

the Board, including the pleadings, testimony, evidence, Findings of Fact, Conclusions of Law, and the order of the Board sought to be enforced and, therefore, denies each and every allegation contained in said Paragraph (3).

IV.

International Union of Operating Engineers, Local No. 12, AFL, further answering said Petition alleges that the said Findings of Fact and Conclusions of Law, referred to in Paragraphs (2) and (3) of the said Petition for Enforcement, are not based upon substantial evidence on the record considered as a whole and, therefore, are void and of no effect.

V.

Respondent further answering alleges that the purported order of the National Labor Relations Board here sought to be enforced is not based upon substantial evidence on the record considered as a whole and, therefore, is null and void and of no effect.

VI.

International Union of Operating Engineers, Local No. 12, AFL, further answering said Petition for Enforcement alleges that the National Labor Relations Board does not have jurisdiction to issue an order in the above-entitled matter within the meaning of the National Labor Relations Act and, further, that it did not effectuate the policies of the Act or of the Board to do so.

Wherefore, having fully answered the Petition for Enforcement of the National Labor Relations

Board, International Union of Operating Engineers, Local No. 12, AFL, a Respondent herein, respectfully prays that the Petition for Enforcement of an order of the National Labor Relations Board be dismissed as to it and that said order of the National Labor Relations Board, with respect to Respondent be fully set aside.

/s/ DAVID SOKOL,

Attorney for International Union of Operating Engineers, Local No. 12, AFL.

Duly verified.

[Endorsed]: Filed June 11, 1956.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, petitioner in the above proceeding, in conformity with the rules of this Court hereby states the following points as those on which it intends to rely herein:

I. Substantial evidence supports the Board's finding that Respondent induced and encouraged employees of Crowell and Larson and of McCammon-Wunderlich Company to refuse to perform services for their respective employers with an object of forcing such employers to cease doing business with Crook and Shepherd, respectively, thereby violating Section 8(b) (4) (A) of the Act.

II. Substantial evidence supports the Board's finding that Respondent induced and encouraged employees of Crowell and Larson and of McCammon-Wunderlich Company to refuse to perform services for their respective employers with an object of forcing or requiring Crook and Shepherd to bargain with it as the representative of the Crook and Shepherd employees, respectively, without its having been selected as such representative, thereby violating Section 8(b) (4) (B) of the Act.

Dated at Washington, D. C., this 10th day of July, 1956.

NATIONAL LABOR
RELATIONS BOARD,

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed July 12, 1956.

[Title of Court of Appeals and Cause.]

On Petition for Enforcement of an Order of the
National Labor Relations Board

STATEMENT OF POINTS ON WHICH RE-
SPONDENT, INTERNATIONAL UNION
OF OPERATING ENGINEERS, LOCAL
NO. 12, AFL, INTENDS TO RELY

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

International Union of Operating Engineers,
Local No. 12, AFL, Respondent in the above-en-

titled proceeding, in conformity with the rules of this Court, hereby states the following points upon which it intends to rely.

I.

The National Labor Relations Board is without jurisdiction over Respondent and the subject matter herein involved.

II.

That the Board's findings of fact and conclusions of law that the Respondent violated the Act, as amended, are not supported by substantial evidence on the record considered as a whole and are contrary to law.

III.

That the National Labor Relations Act, as amended, deprives Respondent of due process of law and is otherwise unconstitutional and void.

Respectfully submitted,

/s/ DAVID SOKOL,

Attorney for International Union of Operating Engineers, Local No. 12, AFL.

July 24, 1956.

[Endorsed]: Filed July 26, 1956.

No. 15,151

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 12, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

**NORTON J. COME,
WILLIAM J. AVRUTIS,**
*Attorneys,
National Labor Relations Board.*

FILED

OCT 25 1956

CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15,151

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 12, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended,¹ for enforcement of its order (R. 47-50)² issued against respondent on January 9, 1956. The Board's decision and order are reported in 115 NLRB No. 9. This Court has jurisdiction of these proceedings

¹ 61 Stat. 136, 29 U.S.C., Sec. 151, et seq. The relevant statutory provisions are reprinted *infra*, pp. 23-26.

² References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

under Section 10(e) of the Act, the unfair labor practices having occurred at Glendora and Stone Canyon, California, within this judicial circuit.³

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent, International Union of Operating Engineers Local 12 (the Union), violated Section 8 (b) (4) (A) of the Act by inducing and encouraging employees to refuse to perform services for their employers with an object of forcing such employers to cease doing business with Crook and Shepherd, with whom the Union had primary disputes. The Board further found that the Union violated Section 8 (b) (4) (B) of the Act in that another object of such inducement and encouragement was to force Crook and Shepherd to bargain with the Union as the representative of their employees without its having been certified as such representative. The Board based these conclusions upon the following evidentiary facts:

A. THE UNION ACTION RESPECTING CROOK COMPANY

1. *The Union loses an election among Crook's employees, and then causes employees of a Crook customer to stop work*

On February 17, 1955, the Union placed pickets at the yard of Crook Company in Los Angeles. They were

³ The employers Crook Company, a corporation, and Shepherd Machinery Company, a partnership, each doing business at Los Angeles, California, sell and service construction equipment (R. 5-6; 113, 117, 121). Crook's annual purchases and sales across state lines exceed \$900,000 and \$100,000 respectively, while those of Shepherd exceed \$1,000,000 and \$100,000 respectively (R. 5-6; 113, 114-115, 122-123). On these facts, both businesses are clearly subject to the Board's jurisdiction.

removed on March 3, when Crook and the Union entered into a consent agreement providing for a Board-conducted election to determine whether Crook's employees desired the Union as their representative (R. 6, 32, 41; 117-118, 149, 151). On March 9, Crook's employees voted against representation by the Union. Thereupon the Union restored its picket line, and there has been intermittent picketing of the Crook premises ever since (R. 41, 6; 117-118, 149-150, 151).

On March 30, Fred Neuenschwander, an employee of Crook, went to the job site of Crowell & Larson in Glendora, California, to adjust some machines obtained from Crook. The Union's business representative, Joseph Mussro, came over to interrogate Neuenschwander (R. 8, 32; 71-73, 84, 119, 79-81, 218). Upon learning that Neuenschwander was working for Crook, Mussro asked whether he had come through the Union's picket line at the Crook premises (R. 8, 32; 73, 75, 81, 91). When Neuenschwander admitted that he had done so, Mussro first told him to leave the site, but then recanted his instruction (R. 8, 32; 73, 75, 81, 91). Speaking loudly enough to be heard by the Crowell & Larson employees who had gathered some 18 feet away and were having lunch, Mussro announced that Neuenschwander could finish his job, but that "we are not going to work" (R. 8, 32; 73-74, 77-78, 81, 91-92).

The lunch period ended at 12 noon. Fifteen minutes later Neuenschwander completed his work and left (R. 8; 72-73, 75-76, 79). The Crowell & Larson employees did not return to their operations at the end of the lunch recess but engaged in conversation with Mussro (R. 8; 33, 75-76). He told the men that, since the Union was picketing Crook, they might not prop-

erly work while a Crook employee fixed equipment at their job site (R. 9, 34; 80, 82, 91). Mussro also warned Foreman Dias, who wanted to resume work, to stand aside or he would close the operation down, and the foreman yielded (R. 34; 98). Noticing that the equipment was new, he next asked whether it had come through the picket line. Failing to get the desired information, he took down the serial numbers of the machines, and threatened that, if he found they had actually passed through, he would come back and "shut down tight" (R. 9, 34; 92-93, 82).

At five minutes to one, Mussro, about to leave, told the Crowell & Larson employees that they might return to work (R. 9, 34; 83, 88-89, 92-93). Their employer later docked each man for the hour's unauthorized shutdown after the lunch period (R. 9, 34; 94-95, 97).

2. The Union requests a bargaining conference, but avoids another Board-conducted election

On May 11, the Union sent Crook and other equipment distributors in the area a letter which it had signed jointly with a local of the Teamsters' Automotive Workers (R. 41; 155-156, 158-159). The signatories stated that they had been seeking an "Agreement" with these employers for several months but had been making no progress. They went on to ask that each firm send a representative to a meeting at a stated place on May 16 "for the purpose of entering into negotiations with the unions involved, to conclude a workable Agreement" (R. 42; 158-159).

To resolve this representation question, on May 16 Crook and the other employers petitioned the Board to conduct representation elections (R. 42). The next day, the Union wrote the Board that it did not claim to repre-

sent an employee majority in any of the units set forth in the employers' petitions (R. 42; 146-148, 152-153).⁴ But, a week later, in spite of this disclaimer, J. H. Seymour, personal representative to J. H. Bronson, the Union's business manager, called Crook's principal stockholder, W. G. Crook, and asked for an appointment. He explained according to Crook's uncontradicted testimony, that "he would like to make an agreement with us and a contract as to our labor situation" (R. 42; 152).

B. THE UNION ACTION RESPECTING SHEPHERD MACHINERY COMPANY

1. *The Union asks to negotiate with Shepherd, but avoids a Board-conducted election*

In January 1955, the Union informed Don C. Montgomery, Shepherd's general manager, that it "would like to establish a contract with the Shepherd people" (R. 45; 126). During March and April, Union Business Manager Bronson and Seymour, Bronson's personal representative, discussed a contract with Montgomery several times (R. 45, 14; 127). In one conference, they presented an agreement in effect at a similar operation and asked that Shepherd contract on the same terms (R. 45; 127). When Montgomery replied with the suggestion that the Union seek a Board elec-

⁴ The Board subsequently dismissed Crook's petition in this proceeding on the ground that a valid election had been conducted among Crook's employees within 12 months prior to the filing of its petition. (See p. 3 *supra*, and Section 9 (c) (3)). However, there being no such bar insofar as the other petitions were concerned and concluding that the Union's disclaimer of a representative interest was not *bona fide*, the Board directed elections on the other employer petitions. *Casey-Metcalf Machinery Co.*, 114 NLRB 1520.

tion to establish the fact that it actually represented Shepherd's employees, the Union answered that "no election was desired, as far as the Union was concerned," and dropped its effort to negotiate (R. 45, 46, 15; 127-128).

Shepherd itself then filed a representation petition with the Board on April 8, but on April 15 the Union filed a disclaimer of any interest in representing the employees. The Board's Regional Director thereupon dismissed the petition (R. 45, 16; 129-130).

The Union, however, continued to seek representative status among Shepherd's employees. It sent the employees mimeographed invitations to attend a scheduled meeting to discuss representation (R. 45; 129-130). On May 11 it included Shepherd among the employers to whom it sent its joint letter, mentioned above (p. 4), in which it asked these employers to send representatives to a conference which it had scheduled for the purpose of negotiating an "Agreement" (R. 45; 130). The letter pointed out that the signatories were seeking a general conference because W. W. Shepherd, of the Shepherd firm, had been acting for the group of employers but the Union had found that in dealing with him "it was evident that we could not proceed and enter into negotiations" (R. 41-42; 158-159).

To clear up the representation situation which the Union consistently refused to resolve, Shepherd filed a second representation petition on May 15 (R. 45; 129, 130), which was followed by and consolidated with the other petitions described above (p. 4). However, when the Union, on May 17, filed a disclaimer of interest in the proceeding, Shepherd withdrew its petition (R. 45-46; 130) .

About May 23, the Union began picketing Shepherd's

premises (R. 46, 14; 124). At first its signs read "This firm is non-union"; later they alleged that Shepherd was "unfair to organized labor" (R. 14; 124). The Union picketed continuously until a few weeks before the Board hearing, and intermittently thereafter (R. 46; 124, 150).

2. The Union causes employees of a customer of Shepherd to stop work

On May 24, 1955, Ralph Sterling and a helper, employees of Shepherd, drove in a Shepherd pick-up truck to the job site of McCammon-Wunderlich in order to repair some equipment Shepherd had furnished (R. 17, 36; 52-53, 59, 60, 65-66, 125-126). Red Hunter, the Union's steward on the job, seeing the truck, asked Sterling whether the Shepherd shop was being picketed and Sterling said that it was (R. 17, 36; 54, 61, 66). Sterling, in answer to Hunter's next question, told Hunter that he intended to work there, whereupon Hunter replied that, if this were so, he would close the job down (R. 17, 36; 55). Hunter then drove about the project giving the men a "thumbs-up" signal to stop work (R. 17, 36; 56, 62, 64). Obediently, the equipment operators dropped what they were doing and collected at a central point (R. 17, 36; 56-57).

Hunter explained, in the presence of McCammon's carpenter foreman, James Green, that the job was shut down because a Shepherd truck was on the site, and then proceeded to order a crane operator to drop his load or be fined \$100 (R. 18, 38; 61-62). Green advised the employee to yield to Hunter's order (R. 18, 38; 63).

Waggoner, McCammon's superintendent, informed of the work stoppage, told Sterling to leave (R. 17, 36-37; 57, 58-59, 66). He then advised Hunter that Shep-

herd's man was going and that the steward could therefore tell the others to go back to work (R. 17, 37; 67). Hunter instructed the employees to resume operations, the stoppage having lasted from 20 to 45 minutes (R. 17, 37; 58, 63, 67, 70-71). Thereafter, Waggoner telephoned Seymour, the personal representative of Union Business Agent Bronson, at the Union hall, and protested the work stoppage (R. 17, 38; 67). Seymour replied that, since there was a picket line at the Shepherd shop, McCammon could not have Shepherd people on its job, Shepherd employees might not even service the equipment as required under Shepherd's warranties, nor might McCammon buy parts from Shepherd (R. 17-18, 38-39; 68).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Union induced and encouraged employees of Crowell & Larson and of McCammon-Wunderlich to refuse to perform services for their employers with an object of forcing or requiring these employers to cease doing business with Crook and Shepherd respectively, thereby violating Section 8(b)(4)(A) of the Act. The Board further found that an additional objective of this union activity was to force Crook and Shepherd to bargain with the Union as the representative of their employees without having been certified as such representative, in violation of Section 8(b)(4)(B) (R. 31-32, 39, 40, 41, 45, 46).

The Board's order (R. 47-50) requires respondent to cease and desist from the unfair labor practices found, and to post appropriate notices.

I

Substantial evidence supports the Board's findings that the Union, in violation of Section 8(b)(4)(A) and (B) of the Act, induced and encouraged employees of Crowell & Larson and of McCammon-Wunderlich to stop work for the dual object of (1) compelling these employers to cease doing business with Crook and Shepherd, and (2) of forcing Crook and Shepherd to recognize and bargain with the Union as the duly elected representative of their employees although not certified as such.

A. With respect to the Union's encouragement of a work stoppage by Crowell & Larson's employees, the evidence shows that, when Crook's employee appeared on the Crowell job site, Union representative Mussro instructed the Crowell employees to stop work until he left. The employees did so, resulting in a work stoppage of about one hour in duration. Union representative Mussro also took down the serial numbers of equipment which Crowell & Larson had just obtained from Crook, threatening to "shut down tight" if he found that they had come through the picket line which the Union had imposed at Crook's premises.

This work stoppage occurred in the midst of persistent efforts by the Union to secure recognition as the representative of Crook's employees without being certified as such by the Board. Thus, prior to the work stoppage, the Union had placed a picket line in front of Crook's premises, which was withdrawn when Crook agreed to a Board election, but reinstated as soon as the Union lost the election. Moreover, after the picketing resumed, the Union on at least two occasions requested

Crook officials to bargain with it concerning a contract for its employees.

B. As to the Union's inducement of employees of McCammon-Wunderlich, the evidence shows that a Union representative at McCammon's project, citing the Union's current picketing of Shepherd, directed McCammon's employees to stop work while a Shepherd employee was there to service equipment from Shepherd. The Union representative also threatened a crane operator with a heavy fine if he failed to obey the order. The Union thereafter ratified its representative's conduct, telling McCammon's superintendent that the work stoppage was directed against Shepherd, and that McCammon might have no dealings with Shepherd while the Union picketed that firm.

As with Crowell, this work stoppage occurred in the context of persistent efforts by the Union to obtain recognition from Shepherd without a Board certification. Accordingly, it is clear that the work stoppage had as its further object one prohibited by Section 8 (b) (4) (B), i.e., exerting secondary pressure on Shepherd to recognize the Union without a Board certification.

II

No substantial question is presented by the Union's contention that the Board erred in predicating its findings as to the amount of business done by Crook and Shepherd on the testimony of responsible officials of these Companies, who had first hand knowledge of their Company's operation and testified from such knowledge. *N.L.R.B. v. Haddock Engineers*, 215 F. 2d 734 (C.A. 9), relied on by the Union, is distinguishable on its facts.

I

Substantial Evidence Supports the Board's Finding that the Union Induced and Encouraged Employees of Crowell & Larson and of McCammon-Wunderlich Company to Refuse to Perform Services for Their Employers, in Violation of Section 8 (b) (4) (A) and (B) of the Act

Section 8(b)(4)(A) and (B) of the Act make it an unfair labor practice for a labor organization or its agents:

to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to cease using, [or] handling . . . the products of any other producer, processor or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9; . . .

We shall show that the evidence fully supports the Board's finding that respondent, in violation of these provisions, induced and encouraged the employees of Crowell & Larson and of McCammon-Wunderlich to stop work with the objects (1) of compelling their employers to cease doing business with Crook and Shepherd, and (2) of forcing or requiring Crook and Shepherd to recognize and bargain with the Union as the

representative of their employees without having been certified as such under Section 9.

A. THE UNION'S INDUCEMENT OF THE EMPLOYEES OF CROWELL & LARSON

The facts summarized in the Statement (pp. 2-4) show that, while the Union was picketing Crook's premises, Crook employee Neuenschwander went to the job site of Crowell & Larson to service some equipment that had been obtained from Crook. On seeing Neuenschwander, and learning that he was a Crook employee, Union business representative Mussro announced, within the hearing of Crowell & Larson's employees, who were members of the Union, that so long as an employee of Crook worked on equipment there, "we are not going to work." Thereupon, the Crowell & Larson employees suspended operations for an hour, returning to their jobs only after Neuenschwander had left and Mussro told them they might do so. At the same time, Mussro took down the serial numbers of the serviced machines, and threatened to "shut down tight" if he found that they had come through the picket line.

On these facts, it seems perfectly clear, as the Board found, that the Union caused the employees of Crowell & Larson to stop work, with an object of forcing Crowell & Larson to cease using equipment obtained from Crook or otherwise to stop dealing with that firm. Cf. *N.L.R.B. v. Washington Oregon Shingle Weavers District Council*, 211 F. 2d 149, 150 (C.A. 9).⁵

⁵ There is no question that Mussro's conduct was within the scope of his general authority, and thus attributable to the Union. *Schauffler v. Highway Truck Drivers*, 230 F. 2d 7, 12 (C.A. 3); *N.L.R.B. v. Denver Building Trades & Construction Council*, 193 F. 2d 421, 423, 424 (C.A. 10);

Moreover, the evidence shows (pp. 4-5) that, throughout this period, the Union's goal in picketing Crook was to obtain recognition as the representative of its employees. Thus, the picketing of Crook's premises had commenced about February 17, 1955, and it ceased on March 3, as soon as Crook agreed to a Board-conducted representation election. However, about March 9, after Crook's employees had rejected the Union in that election, the picketing of Crook was resumed, and on March 30 it was augmented by the Crowell & Larson work stoppage. This was followed by the Union's letter to Crook and the other employers requesting a bargaining conference, and by Union representative Seymour's specific request to Crook's chief stockholder, W. G. Crook, "for an agreement with us and a contract as to our labor situation" (p. 5). In these circumstances, it was reasonable for the Board to conclude that the employees of Crowell & Larson were induced to stop work for the additional object, prohibited by Section 8 (b) (4) (B) of the Act, of exerting secondary pressure on Crook to recognize the Union despite its lack of a Board certification.

The Union's contrary contentions are without merit:

1. Before the Board the Union contended that the Crowell & Larson employees remained away from their work, not because of the Crook employee, but because they were occupied in having their Union cards checked by Mussro and in conferring with him on personal matters; and, moreover, that the delay was due to Foreman Dias' failure to direct them to return to work. However, prior to checking the cards, Mussro had made it plain to the employees that they were not to work so long as Crook's employee was there, and the card-check itself could not explain a one-hour delay for *all* of the

employees.⁶ Nor might the Union shield itself behind the foreman's passivity, for the Union itself had compelled it. Thus, Mussro had threatened Dias with a shutdown, and had him stand aside and refrain from directing any resumption of work until Mussro himself gave the order (R. 226). Meanwhile, Mussro's previously issued direction to the employees was in effect as the underlying cause of the stoppage. Finally, Foreman Dias' lack of responsibility for the delay in returning to work is confirmed by the fact that, thereafter, Crowell & Larson deducted an hour's wages from each of the men for an unauthorized work stoppage (p. 4).

2. The Union also sought to excuse the stoppage on the ground that it was "at best . . . merely a sporadic momentary failure to return to work." But, as the Board properly noted (R. 35), "the determination as to whether a union has violated the Act by inducing a proscribed work stoppage does not depend upon the duration of the stoppage." Indeed, the mere attempt of a union to bring about a work stoppage contrary to the Act's provisions is enough to make out the statutory violation, even though such effort were not at all successful. *N.L.R.B. v. Associated Musicians of Greater New York*, 226 F. 8d 900, 904-905 (C.A. 2), cert. den., 351 U.S. 962. In any event, far from being too trivial for notice by the Board or this Court, the work stoppage was "executed with all the precision of a military operation, and the illegal procedure adopted was so

⁶ Mussro admitted that he ordinarily checked but one card at a time, leaving all the other employees free to do their work (R. 33; 138). Furthermore, his effort to show that his card check had been prolonged by discussions with certain individual employees was contradicted by the testimony of Union members credited by both the Trial Examiner and the Board (R. 33, 13; 132-133. Compare R. 139, 86-87, 98-99).

completely successful" in bringing home to Crowell & Larson the need to heed the Union's declared displeasure with Crook "that attempts to do the same thing again were unnecessary" (*N.L.R.B. v. Local 140, United Furniture Workers*, 233 F. 2d 539, 540 (C.A. 2)).

3. On no firmer ground is the Union's contention that it did not have the recognition objective proscribed by Section 8 (b) (4) (B) because it was picketing Crook to protest an alleged discriminatory discharge of 10 employees on February 15, and also the performance by nonunion employees of work which had been awarded to its members by the American Federation of Labor (R. 42-43; 149-150). There was no occasion for the Union to protest against any discriminatory charges for, as the Board found, the employees had never been discharged. They were merely laid off; had thereafter been permitted, as regular employees, to vote in the consent election of March 9 without Company challenge; and were being called back to work as business conditions permitted (R. 43; 155). Furthermore, the fact that the picketing stopped when Crook signed the election agreement although the alleged discriminatory discharges had only recently taken place, and it resumed as soon as the Union lost the election (*supra*, p. 3), indicates that the Union's picketing and other actions were not geared to the layoffs but to obtaining recognition from Crook despite the adverse election results.

The Union's contention that it sought to protest the performance by nonunion employees of work which the rules of its parent organization accorded to its members is negated by the fact that the record reveals occasions where employees of neutral employers were induced to

withhold their services even though the repair or maintenance of equipment operated by the Union's members was not involved (R. 43, 10-12, 13-14; 239-244, 253-257).⁷ Moreover, as the Board pointed out (R. 43), "an intra-union ruling cannot constitute a defense to unlawful conduct."⁸ That is, even if the Union were in part motivated by the intra-union award, this would not insulate the work stoppage involving Crowell & Larson's employees for the evidence previously summarized (pp. 2-5, *supra*) demonstrates that the prohibited goal of forcing recognition from Crook was at least a further object of the work stoppage. See *N.L.R.B. v. Local 74*, 341 U.S. 707, 713.

B. THE UNION'S INDUCEMENT OF THE EMPLOYEES OF McCAMMON-WUNDERLICH

The Board's conclusion that the Union's inducement of the McCammon-Wunderlich employees was also violative of Section 8(b)(4)(A) and (B) is likewise fully supported by the evidence. The evidence shows (pp. 7-8), that, on May 24, 1955, Shepherd employee Sterling went to the job site of McCammon to service

⁷ Thus, on April 19, 1955, when Crook, at a railroad company dock, was about to deliver equipment from a flat car to an employee of Paving Materials Company, the Union's vice president told the employee that the goods were "hot" because the Union was then picketing the Crook yard (R. 10-12; 99-102, 105-108). Informed by the employee that he would not go through a picket line to take delivery, the Union representative took up a picket sign and the employee left without the equipment (R. 11-12; 103-105, 108-109). Although finding that this incident occurred and relying on it for the purpose of negating the Union's defense, the Board found it unnecessary to go further and determine whether the Union's conduct in this instance was violative of the Act (R. 43).

⁸ See *N.L.R.B. v. Philadelphia Iron Works*, 211 F. 2d 937, 940-941 (C.A. 3); *Communications Workers of America, CIO v. N.L.R.B.*, 215 F. 2d 835, 838 (C.A. 2).

some equipment previously obtained from Shepherd. Union Steward Hunter, citing the fact that the Union was then picketing Shepherd, told Sterling that he would close the job down if Sterling did repair work there. Hunter then went about the project, signalling the McCammon equipment operators to halt. He also threatened a crane operator with a heavy fine if he worked while the Shepherd truck was on the site. The McCammon employees went back to work only when management had Sterling leave, and Hunter, in turn, had told the men they might resume work. Moreover, when McCammon Superintendent Waggoner later called the Union office to protest the work stoppage, he was told by Union representative Seymour, whose voice he knew (R. 67), that the Union would not permit Shepherd employees to work at the project while the Union was picketing Shepherd. Seymour added that McCammon might not turn to Shepherd for the services called for under the latter's warranties on the equipment it had sold McCammon, nor for needed parts.

On these facts, it is manifest that the Union induced and encouraged a work stoppage of McCammon-Wunderlich's employees, with an object of causing McCammon-Wunderlich to stop using Shepherd's products and to cease doing business with Shepherd, thereby violating Section 8 (b) (4) (A) of the Act.⁹

Similarly, it is apparent that a further object of this work stoppage was to exert secondary pressure on

⁹ Hunter's actions, as the Board found (R. 36, n. 8), were clearly within the scope of his employment as Union steward. *N.L.R.B. v. Shingle Weavers' Council*, 211 F. 2d 149, 150 (C.A. 9). And, as shown by Seymour's conversation with Waggoner, *supra*, the Union specifically ratified Hunter's actions.

Shepherd to recognize the Union as the representative of its employees, contrary to Section 8 (b) (4) (B) of the Act. Thus, for several months prior to the McCammon incident, the Union had been attempting to obtain a contract from Shepherd covering its employees (pp. 5-6). It made its first demands in early 1955, but backed away in April when Shepherd petitioned the Board for a representation election. However, as soon as the petition was dismissed, the Union tried to induce Shepherd's employees to attend a meeting for the purpose of discussing representation by the Union, and dispatched a letter to Shepherd and other employers requesting a bargaining conference and pointing out the Union's previous difficulties in entering into negotiations through one of the Shepherd partners. Shepherd thereupon (May 15) filed another representation petition with the Board, which was again met by a Union disclaimer of interest. However, when Shepherd then withdrew this petition, the Union, on May 23, demonstrated that it was still seeking to represent Shepherd's employees by setting up pickets around Shepherd's yard. Against this background, when the Union, the next day, induced the McCammon-Wunderlich work stoppage, which was avowedly directed against Shepherd, it necessarily follows that a purpose thereof was to further its goal of obtaining recognition from Shepherd without a Board certification.

As with the Crowell-Larson incident, the Union's contentions do not impair the foregoing conclusions respecting its inducement of the McCammon-Wunderlich employees:

1. Before the Board, the Union contended that the stoppage of work by the McCammon employees was entirely spontaneous and that Steward Hunter had no

part in it. In support of this contention, the Union adduced testimony from employees Luther and Thomason, who stated that, in consequence of prearrangement among the men themselves, various operators had driven around giving the thumbs-up signal when the Shepherd truck appeared and that Hunter was not even in sight. The Board and Trial Examiner, finding the testimony of these witnesses to be vague and contradictory as to the identity of the operators who had so agreed, properly declined to credit it, accepting instead Foreman Green's statement that Hunter had in fact given a "thumbs-up" signal to the men (R. 18-19, 37). The propriety of this decision is reinforced by the fact that the Union failed to call Steward Hunter to testify (R. 37). *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 315 (C.A. 9), cert. den., 348 U. S. 833; *Interstate Circuit v. United States*, 306 U.S. 208, 226. Moreover, even if Hunter did not induce Luther and Thomason, there was Union inducement by virtue of Hunter's threat to the crane operator that he would be fined \$100 unless he stopped working while the Shepherd truck was present (p. 7, *supra*).

2. The Union also contends that the crane operator whom Hunter threatened with a fine ceased work only after his foreman, Green, advised him to obey the steward's order; hence, the crane operator's stoppage resulted from direction by management, rather than the Union. This contention fails for two reasons. First, regardless of what management did afterwards, the Union's prior order to the crane operator was in itself violative of the Act. Second, as the Board found (R. 38), it is apparent that Hunter's threat to the employee was the true cause of his ceasing work. In the circumstances here, the foreman's advice to the em-

ployee to avoid the fine by obeying the existing Union order could not be regarded as employer acquiescence in the Union's demands, but was merely an effort to spare the employee from the penalty threatened by the Union.

3. The Union seeks to avoid the Section 8(b)(4) (B) finding by arguing, as in the case of Crook, that it picketed Shepherd merely to protect its grant from the American Federation of Labor of jurisdiction over work which was being done by nonunion Shepherd employees. For reasons previously given (pp. 15-16), such a state of facts, even if true, does not make out a defense, and the Board, in addition, properly found the contention unconvincing in the light of the entire record.

II.

The Board Properly Concluded that the Commerce Facts Respecting the Businesses of Crook and Shepherd Were Established by Competent Evidence

In finding that Crook and Shepherd were in commerce (n. 3, *supra*), the Board relied upon testimony of the general manager of Crook and the assistant general manager of Shepherd, each of whom spoke from personal knowledge of his company's operations, that its interstate business exceeded named amounts. The Board has accepted such proof in a large number of cases, and the propriety of doing so has customarily been recognized by the parties involved. Respondent, however, contended before the Board that this kind of testimony was of no probative value because it is not the best evidence of the commerce facts, consisting only of uncorroborated hearsay conclusions and opinions. We submit that the Board properly rejected this contention.

Since the witnesses occupied responsible positions and the very nature of their duties made them familiar with the matters about which they testified, their testimony was entirely competent and admissible for the purpose for which it was offered. See *Dixie Terminal Company*, 102 NLRB 1452, 1456-1464, enforced 210 F. 2d 538 (C.A. 6), cert. den., 347 U.S. 1015; *Amalgamated Meat Cutters*, 81 NLRB 1052, n. 1. Moreover, Section 10(b) of the Act provides that the Board shall conduct its proceedings "so far as practicable" in accordance with the rules of evidence applicable in Federal district courts under the rules of civil procedure. This provision does not require rigid Board application of the best evidence rule. 2 *Legislative History of the National Labor-Management Relations Act, 1947*, p. 1592; 93 Cong. Rec. 6517 (Senator Taft). In any event, it would appear that the evidence was admissible even under the best evidence rule itself, since it went to prove, not the exact amount of the commerce which was involved, but only the fact that the respective firms were engaged in commerce. This was "something independent of the detailed terms of the account books, and therefore provable without production [of records]." Wigmore on Evidence, 3rd Ed., Sec. 1244(4), citing authorities. See also, *Id.*, Secs. 1230, 1385(3), 1385a.

The facts in *N.L.R.B. v. Haddock Engineers, Ltd.*, 215 F. 2d 734 (C.A. 9), relied on by the Union, are distinguishable because, as the Board noted (R. 3, n. 2) "the data upon which jurisdiction was premised in that case was presented in written form, and the individual who had prepared the written material was not under oath nor available for cross-examination." Here, on the other hand, the facts were adduced solely through the testimony of witnesses, whom the Union had full oppor-

tunity to cross-examine. It not only failed to do so, but also failed to present any witnesses of its own to rebut the testimony of the responsible company officials.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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OCTOBER, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

UNFAIR LABOR PRACTICES

* * * * *

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

* * * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board

(A) By an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a) ;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of repre-

sentation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any cir-

cuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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No. 15,151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 12,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

BRIEF FOR RESPONDENT.

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FILED

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STATEMENT AND ARGUMENT.

I.

Upon the Record Considered as a Whole There Is
No Substantial Evidence Sufficient to Sustain the
Exercise of the Board's Jurisdiction and the Com-
plaint Must Be Dismissed.

A.

The Crook Company.

Crook Company, a corporation, is engaged in the busi-
ness of selling and servicing construction equipment at
retail, in Los Angeles, California, and performs much of
its servicing work on equipment located at construction
projects some of which are a considerable distance from
Crook's Los Angeles locations. [R. 113.]

Michael Bessich, General Manager of Crook, testified that he “overlooks” the operations of the company, works hand in hand with the heads of the various departments, and that these departments are under his “supervision.”

Upon only this foundation and over proper and timely objections of respondent Bessich gave uncorroborated hearsay testimony to the effect that 90% to 95% of the equipment handled by Crook came from without the State of California and that Crook sells outside of California “quite a bit in excess of \$50,000. annually” and upon prodding by the General Counsel further stated that the exports were in excess of \$100,000 per year.

All of this hearsay testimony was given with reference to books and records of the company. In fact Bessich testified that he had not consulted any documents from which he was testifying. No documents were presented at the hearing and no opportunity to consult any such documents was proffered to respondent. There is nothing in Mr. Bessich’s testimony to indicate that any of his statements were or could be supported by documents, records, books of account or other such media. Throughout his testimony, the record shows, Bessich was giving only his conclusions which were not corroborated in any way with factual material. [R. 114, 115.]

B.

The Shepherd Machinery Company.

Shepherd Machinery Company (herein called Shepherd) is a partnership, according to General Counsel’s witness, Montgomery, who stated he was the Assistant General Manager. [R. 120.] Over proper and timely objections of respondent Montgomery was permitted to testify that Shepherd’s “equipment” came from the mid-west—the

annual volume received from a manufacturer in Peoria, Illinois, was "over a million dollars" annually. He further stated that Shepherd's sales outside of California exceeded \$100,000 on an annual basis. He said that Shepherd was engaged in a business of selling and servicing construction and farming equipment in Los Angeles, California. [R. 121-123.] Mr. Montgomery did not testify from any memorandum, books, records or documents of Shepherd nor were any books, records or other documents of the company, which may have supported these various statements, presented at the hearing for inspection of respondent, and no proffer was made to make such documents available to respondent for inspection and for the purpose of cross-examination.

There can be no reasonable doubt that the testimony of these two witnesses was of the clearest hearsay. It is also quite apparent that no attempts at corroboration of this hearsay were made. The companies' records were not in court, no memorandum of their contents was prepared or presented for the record and the testimonies do not even purport to be oral reflections of any records or documents. There was no showing that the records of these companies were unavailable or were of such a nature as to make them impractical of production at the hearing. No attempt is made to excuse corroboration on the basis of inconvenience nor is there any other showing to warrant the departure from the well established rules of evidence on the grounds of impracticability.

Section 10(b) of the Act, reads in part as follows:

"* * * Any such proceeding shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States, adopted by the Supreme Court of the United States

pursuant to the Act of June 19, 1943.” (Emphasis supplied.) The words “so far as practicable” were not inserted into this Act as an idle gesture by the Congress. Congress had heard from litigants before the Board of many instances where uncorroborated hearsay was accepted and made the basis of findings of the Board. Congress had before it the condemnation of this practice set forth in decisions of the Supreme Court, which were made under the Wagner Act that did not require the rule of evidence to be controlling. Particularly did the Supreme Court speak upon the use of uncorroborated hearsay, in *Consolidated Edison Company v. NLRB*, 305 U. S. 197 stating that hearsay uncorroborated was not substantial evidence sufficient to support findings of the Board. Congress’s review of the history of the effect and application of the Wagner Act and unequivocally concluded that a change in evidentiary procedure was required so that litigants before the Board would be afforded reasonable safeguards against past abuses and not to expose them to mere whims and caprices of an administrative proceeding which could operate without limitations in the reception of evidence of the hearsay type and the basing of findings and conclusions bottomed upon such hearsay evidence standing alone.

The legislative history of the Taft-Hartley amendments show that the insertion of the words “so far as practicable” were not intended to permit a return to the practices prevalent and while there was a recognition that flexibility under certain circumstances may be necessary, the added flexibility is not without limitation. “So far as practicable” means there must be some sound basis in reason why it would be impracticable to follow the rules of evidence. The statute leaves no room for arbitrary con-

clusions as to what is and what is not practical. We submit that the Trial Examiner in finding this hearsay; sufficient to support a finding of jurisdiction is completely at war with the attempt of Congress to remedy existing abuses of the use of hearsay.

Both of these companies have their headquarters within the City of Los Angeles. The lack of any attempt to show that their records were voluminous, bulky or that they were constantly required for the operations of these businesses point forcibly to the availability and the practicability of producing them for inspection and verification upon this most important subject. Had there been proof of this, the Board has provided a method which excuses the production of such records by the preparation of memoranda in lieu thereof, provided that due safeguards of checking and inspection are preserved.

We have here neither written nor oral summaries which purport to be of any pertinent records of these companies. We have merely unsupported conclusions and opinions of biased witnesses.

Since the passage of the Taft-Hartley amendments, the United States Court of Appeals for the Ninth Circuit has had occasion to re-examine the doctrine expressed in *Consolidated Edison* and has reaffirmed the Supreme Court's pronouncement that uncorroborated hearsay does not amount to substantial evidence sufficient to sustain a finding of the Board, especially upon such an important decision as the exercise of the Board's jurisdiction. In *NLRB v. Haddock Engineers, Ltd.*, 215 F. 2d 734, the Ninth Circuit declined to enforce a Board Order because its findings of effect upon interstate commerce was only supported by hearsay evidence uncorroborated. In doing so that Court expressly followed the doctrine of *Consoli-*

to finish his chores and whether the trownapull he was working on had not come through respondent's picket line at the Crook Company. Neuenschwander admitted that it had but stated that he would be finished with his work in a short period of time. The Trial Examiner found that Mussro then said to Neuenschwander that he had better leave but almost immediately withdrew the suggestion by saying in a loud voice, "*probably audible* to the Crowell and Larson employees who were standing nearby, 'Well, you can go ahead and work, but we are not going to work.' " (Emphasis supplied.)

Witnesses Smedley and Dias, called by the General Counsel testified about the arrival of Mussro, who upon arrival asked Smedley and Dias if they knew there was a picket line at Crook Company [R. 80, 81, 82, 83, 84], and then went over to Neuenschwander and asked if he had come through a picket line. Smedley said that the Crowell and Larson employees followed Mussro to where Neuenschwander was working; that when Mussro asked him how long it would take to complete the work Neuenschwander replied, 5 or 10 minutes, Mussro told the man to take his time and he would pull the men off the job. [R. 81.] All agreed that Neuenschwander continued to work without further interruption and without any of the personnel or Mussro having further conversation with him.

Dias admittedly was the foreman on the job and had power and authority to require the men to resume their work, but that he did not do so. [R. 96.]

There is no evidence that Mussro gave any direct instructions to the men to cease work or not to resume work. The only possible source of a supposition that Mussro "pulled" the men off the job must come from the conversa-

tion between Mussro and Neuenschwander. The Trial Examiner did not make a finding that the employees heard this conversation, he disposed of this phase by stating that the conversation was "*probably audible*" to the employees. The evidence shows these employees were 18 to 20 feet away at the time of and during the conversation.

After the conversation Mussro and the employees returned to where the lunches were being eaten and a spirited discussion with and question of Mussro was begun by those employees who were seeking to be enlightened on the various points of controversy with the Crook Company. No one testified that during this episode Mussro gave any instructions not to work or not to resume work. Undisputedly, Mussro performed the functions of his job by listening to "beefs", checking dues cards and Union standing of the men. It is uncontradicted that his routine check was prolonged by lengthy questions concerning matters foreign to the instant matter. [R. 132-135.]

Smedley and Dias also testified about new equipment on this job, and that Mussro asked where it came from, saying that he would take the serial numbers and if he found that the equipment came through a picket line he would come back and shut the job down. However, both Smedley and Dias testified that none of the employees had ever refused to work on this equipment or any other equipment and at the time of the hearing Smedley was still operating the machine which Neuenschwander repaired. [R. 85, 96.]

When viewed unemotionally, this incident at best is merely a sporadic momentary failure to return to work. Whether this result flowed from the failure of the equipment to arrive at noon that day, which the employees were

waiting for or whether it stemmed from other sources is not found by the Trial Examiner. It is true that he found that Mussro stated that the men would not work as long as Neuenschwander was on the job and that Mussro stated that he would take serial numbers, investigate, and if certain facts were present he would come back and shut down the job. But the Trial Examiner did not find that these statements caused or compelled the failure to return to work, if there was one. The Trial Examiner did not find that these statements, even if made, were acts of inducement or encouragement or were otherwise violative of the Act. The failure to make such findings may have resulted from the Trial Examiner's uncertainty which he revealed when he stated that Mussro's statements to Neuenschwander were "probably" within the hearing of the Crowell and Larson employees. It may be that he disregarded the undisputed testimony that Mussro's time, while on the job, was occupied by the fulfilling of his ordinary functions. In any event, the Trial Examiner had made no findings that these acts of Mussro caused or attempted to cause the employees to fail to return to work.¹ The absence of such findings and the further absence of any exceptions to the failure to make those findings is binding on the Board and must be accepted by the Board, as the statute requires.

¹Crowell's Foreman Dias, who was in charge of the job, made no effort to get the men to return to work. In fact, he combined to effect the failure to return to work. The plain facts are that as to three of these employees it was not possible for them to return to work before the time they did so. Smedley could not work because his equipment was being repaired, the water wagon driver had not had his lunch period and Ullibarri could not get his equipment going until after the arrival of the needed equipment. The four remaining employees had questions of personal natures and discussed them with Mussro.

The Trial Examiner and the Board, concurring, found, generally, "By inducing and encouraging employees of Crowell and Larson . . ." respondent has violated 8(b)(4)(A). But this conclusion is meaningless because it is not founded on any factual finding that Mussro's activity and conduct violated the Act in any particular. This the Board must accept. (Section 10(c) NLRB; Administrative Procedure Act, Sections 7 and 8.) *International Brotherhood of Electrical Workers v. NLRB*, 181 F. 2d 34; *Rabouin d/b/a Conway Express Co.*, 87 NLRB #130; review denied 195 F. 2d 906; *Arkansas Express Co.*, 92 NLRB 255; *Ferro Corp.*, 100 NLRB 1660; *Crowley Milk Co.*, 104 NLRB 102.

B.

Incident in Which Shepherd Machinery Company Was Involved.

1. THE McCAMMON-WUNDERLICH INCIDENT.

McCammon-Wunderlich Company, on May 23, 1955, was engaged in an earth moving construction job in a suburb of Los Angeles, California. At 4:00 A.M. that morning several of its employees, operators of the equipment, met before beginning their day's work and discussed the question of non-union men coming onto such jobs and doing the work which came under the jurisdiction and contracts of respondent with employer, including McCammon-Wunderlich. They decided that the next time a non-union workman came onto the job for the purpose mentioned they would "more or less go and get a drink of water until they (the non-union men) left." [R. 142, 143, 144, 145, 146.] Only employees were present at this meeting. The *Job Steward was not*.

Later that morning a truck from Shepherd came on the job in plain view of most of the employees and stopped on the top of the dam site that was being constructed. Upon its arrival each of the several operators-employees began to relay to each other by signal the fact that a non-union man had come on the job, and pursuant to their previous decision each of the operators-employees ceased their work, and so remained until the non-union employee left the site some 20 or 30 minutes later. [R. 146.]

From the undisputed evidence it appears that most, if not all, of the operators engaged in passing the signals and participated in the work stoppage. [R. 145, 146.]

Clint Waggner, the Job Superintendent for McCammon-Wunderlich, was informed of the stoppage. He immediately ordered the Shepherd men to leave the premises. [R. 66.] Then he called Red Hunter, the Job Steward, and told him about sending the Shepherd men away and requested Hunter to ask the men to return to work, which was done. [R. 67.] Waggner next called the office of respondent and talked to a Mr. Seymour who stated he did not know of any work stoppage and did not understand what had happened. [R. 67.] The record does not reveal what position, if any, Seymour had with respondent or that Seymour was even in the employ of respondent. The Trial Examiner found that Seymour was a "representative of the respondent" but the record only shows that Waggner called the office of respondent and asked for Seymour with whom he had talked a number of times—about what the record is silent. According to Waggner, Seymour said there was a picket line at Shepherd's and that "we (McCammon-Wunderlich) could not have Shepherd people on the job . . ." [R. 68.] We submit that, upon this evidence, a finding of agency binding on re-

spondent is unwarranted and unjustified. From all that appears, Seymour was not established to be an agent of the Respondent Union.

During the process of signaling, Red Hunter, a Shop Steward of respondent, according to the testimony of James Green, a Foreman, was found talking to a crane operator who was employed by a concern other than McCammon-Wunderlich, and upon inquiry by Green the crane operator told Green that Hunter had instructed him to drop his load and swing out the crane's boom or he would be fined \$100. The operator, upon Green's instruction, dropped his load and did as Green had instructed him to do. [R. 61, 62, 63.] Hunter then departed giving the signal to other employees to cease work.

The evidence fairly viewed shows that the stoppage of work was a voluntary action on the part of the employees, taken without instructions or directions from respondent, and, in fact, without even the knowledge of respondent or its agents. The proscription of 8(b)(4) do not reach voluntary and spontaneous acts of employees unless those actions are the result of orders or directions of a labor union. The Trial Examiner did not discredit this undisputed evidence and did not find that the actions of these employees constitute a violation. His findings rest solely upon Hunter's "direction" to the crane operator and his participation in giving signals, and Seymour's statement to Waggner that the "purpose of the respondent [was] to prevent McCammon from doing business with Shepherd."

As we have shown, Seymour was not proved to be an agent of respondent. Whatever he may have said does not bind the Union. The fact that Hunter participated in giving signals does not convert this otherwise voluntary

employee action into an action of respondent. After all Hunter was an employee too. Hunter's action at the crane stemmed from the question put to him by Green, the employer's supervisor, and in giving his answer Hunter was not committing any violation for which respondent was responsible. *NLRB v. Rice Milling Co.*, 341 U. S. 665. Green, the Foreman, was the one that directed the crane operator to cease his work and immediately acquiesced in the position Hunter had stated. Under these circumstances it has been repeatedly held that no violation has been committed. *Arkansas Express Co.*, 92 NLRB 255; *Ferro Corp.*, 100 NLRB 1660.

Even though a finding of a technical violation might be made, which we do not concede, standing alone as it now does, it is not sufficient to warrant a finding of a violation of 8(b)(4). *Santa Ana Lbr. Co.*, 87 NLRB 937.

III.

There Has Been No Violation of 8(b)(4)(B).

We have shown above that there have been no violations of Section 8(b)(4). However, since the complaint alleges a violation of 8(b)(4)(B) we do not rely solely upon the above showing but point to the evidence that respondent makes no claim for recognition from either the Crook or Shepherd companies. The picket line at Crook was maintained because Crook has dealt unfairly with members of respondent union and the Shepherd Company is in open competition with respondent as to who will do the repair work on construction sites. [R. 148, 149, 150.] The record shows that Shepherd filed a petition for certification but withdrew it upon respondent's disclaimer of representative capacity. Respondent also has disclaimed any interest in recognition as the exclusive bargaining agent of the Crook employees.

IV.

Conclusion.

When we face the full impact of the Board's case, this is what we have: A Union business agent, Mussro, in going about his customary duties of ascertaining whether the men on the job are union members takes about an hour in doing so and in discussing their problems and grievances. The Board says that true enough Mussro had the right to be on the premises and check the membership cards etc., but he should not have said to the Crook Company employee that the men would not work as long as he was there. It was the lunch hour and they did not work for about an hour but, thereafter, proceeded about the work. To punish a labor organization because one of its employees may be loose in his language is to overlook the realities involved. Mussro never intended to violate the law or to damage the Union by his few brief words.

The other episode complained of has equal importance. In the McCammon-Wunderlich matter, the company superintendent himself did not want the disturbing factor of the Shepherd Company men on the premises and his staunch Union employees had banded themselves together, without Union coercion or persuasion, to assert their lawful right to work with whomever they chose. They might have been fired for this but it was not a violation of the Act.

We believe this powerful arm of the Government should not be used except upon a clear showing of purposeful violation of the Act. This Honorable Court has said that to predicate a cease and desist order upon such occurrences is to magnify the inconsequential. (See Title 5, U. S. C. A., Sec. 1009(e); *N.L.R.B. v. Meatcutters Local*, 202 F. 2d 671.)

We urge, therefore, that the Board's order be denied enforcement, because of lack of proof on the merits and with respect to the Board's jurisdiction.

Respectfully submitted,

DAVID SOKOL,

Attorney for Respondent.

No. 15153

United States
Court of Appeals
for the Ninth Circuit

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
Katherine Stromberg, Deceased,

Appellants,

vs.

ROBERT A. RIDDELL, Director of Internal
Revenue and Formerly Collector of Internal
Revenue for the Sixth District of California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JUL 25 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

No. 16183-HW

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
Katherine Stromberg, Deceased,

Plaintiffs,

vs.

ROBERT A. RIDDELL, Director of Internal
Revenue and Formerly Collector of Internal
Revenue for the Sixth District of California,

Defendant.

COMPLAINT

(To Recover Federal Estate Taxes)

Comes now, California Trust Company and Hunt Stromberg, co-executors of the Estate of Katherine Stromberg, deceased, plaintiffs herein, and complain of Robert A. Riddell, Director of Internal Revenue, formerly Collector of Internal Revenue, for the Sixth District of California, the defendant, and allege as follows:

I.

Katherine Stromberg died on March 15, 1951, and on May 8, 1951, in proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, designated as No. 316324 in the probate files of said Court Letters Testa-

mentary were duly issued to plaintiffs as Executors. At all times since said date, plaintiffs have been and now are the duly appointed, [2*] qualified and acting Executors of the estate of said decedent.

II.

Plaintiff, California Trust Company, is a corporation duly qualified to do business in the State of California, having its principal place of business in Los Angeles, California, and plaintiff, Hunt Stromberg, is a resident of the Southern District of the State of California, residing at 10401 Wilshire Boulevard, West Los Angeles, California.

III.

Defendant is Director of Internal Revenue for the District which includes Los Angeles County. From May 1, 1950, to November 25, 1952, defendant was Collector of Internal Revenue for the Sixth District of California. From November 25, 1952, to the present date defendant has been and now is Director of Internal Revenue for the Sixth District of California.

IV.

On or about February 28, 1952, plaintiffs filed with defendant, then Collector of Internal Revenue, an estate tax return for the estate of Katherine Stromberg, deceased. The tax liability disclosed on said return was \$17,017.58 which sum was paid to the defendant on April 28, 1952.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

V.

On or about January 28, 1953, defendant, then Director of Internal Revenue, mailed to plaintiffs a copy of a report of examination of said estate tax return in which a deficiency of \$47,271.57 was proposed. On April 13, 1953, defendant notified plaintiffs that a tax in the amount of \$47,271.57 and interest in the amount of \$2,220.47 or a total of \$49,492.04 had been assessed against plaintiffs. Demand was therein made for immediate payment of said tax and interest. On April 23, 1953, plaintiffs paid to defendant the sum of \$47,271.57 plus interest in the sum of \$2,220.47 or a total of \$49,492.04 in payment of said tax and [3] interest.

VI.

On June 19, 1953, plaintiffs filed with defendant a claim for refund of taxes and interest, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A." On November 24, 1953, defendant notified plaintiffs in writing that there were no grounds for reduction in tax liability as a result of the examination of the estate tax return and the claim for refund filed. A copy of the examining officer's report, dated October 27, 1953, was attached to said notice.

VII.

More than six months has elapsed from the date of filing such claim for refund. No notice of the disallowance of the claim for refund or any part thereof has been mailed by registered mail by the Commissioner of Internal Revenue to plaintiffs.

VIII.

In decedent's will dated March 27, 1947, which will was probated as decedent's last will and testament, decedent bequeathed her entire estate to her husband, Hunt Stromberg. Said will provided in part, "Should he predecease me or fail to survive distribution of my estate, I give, devise and bequeath my entire estate to my son, Hunt Stromberg, Jr." On September 14, 1951, after the first Account Current and Report of Executors had been filed and approved by the said probate court and pursuant to a petition for partial distribution, which petition was prepared and filed by plaintiffs, the Court ordered a distribution of certain assets of the estate to Stromberg. The assets ordered to be distributed by the Court totalled \$113,024.31. On May 16, 1952, the Court ordered a further distribution of the assets of said estate and on August 15, 1952, the remaining assets of the estate were distributed to Hunt Stromberg pursuant to the [4] provisions of decedent's last will and testament. Hunt Stromberg, husband of decedent, survived each of the distributions ordered to be made by the Court, and no part of decedent's estate passed to any person other than Hunt Stromberg. All distributions ordered to be made by the Court were made forthwith. Plaintiffs as executors have complied with all statutory requirements of the probate of the will and settlement of the estate of said decedent and have performed all acts required by the California Probate Code.

IX.

In his examination of the estate tax return, the examining agent made two errors which resulted in the assessment of a tax in excess of the lawful tax liability of the plaintiffs herein:

(a) The examining agent improperly included in the gross estate of decedent the sum of \$71,368.55 which amount is one-half of the cash surrender value of certain insurance policies on the life of the surviving spouse of decedent, and

(b) Disallowed as a deduction one-half of the total bequests to decedent's surviving spouse.

X.

As to the error alleged in paragraph IX (a) above, plaintiff alleges that decedent had no interest, community or otherwise, in the life insurance and annuity policies owned by her surviving spouse and upon his life which is includible in decedent's gross estate for estate tax purposes under any internal revenue law or regulation. As to the error alleged in paragraph IX (b) above, plaintiffs allege that a marital deduction equal to one-half of the value of the adjusted gross estate passing to the surviving spouse is proper under Section 812(e) of the Internal Revenue Code. [5]

XI.

No part of the taxes herein before claimed to have been illegally assessed and collected has ever

been repaid, refunded or remitted to plaintiffs and no part thereof has been allowed to said plaintiffs by way of credit or offset against any other tax due or claimed to be due from them to the United States.

XII.

Plaintiffs' correct tax liability is \$4,641.12 and not \$64,289.15 as assessed and collected by defendant. Interest in the amount of \$2,220.47 has been erroneously and illegally assessed and collected. The total tax and interest erroneously and illegally assessed and collected is \$61,868.50.

Wherefore, plaintiffs demand judgment against defendant for the sum of \$61,868.50 plus interest thereon as provided by law and for such other and further relief as may be just and proper in the premises.

WRIGHT, WRIGHT, GREEN
& WRIGHT,

LOYD WRIGHT, and
CHARLES A. LORING,

By /s/ S. EARL WRIGHT. [6]

EXHIBIT A

Form 843

Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

[Collector's Stamp]: Received, 95, June 19, 1953.
Director Int. Rev., Los Angeles.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Estate
of Katherine Stromberg, Deceased.

Business address: c/o California Trust Co., 629 S.
Spring Street, Los Angeles, California.

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Sixth, California.

* * *

3. Character of assessment or tax: Estate Tax.

4. Amount of assessment, \$66,509.62; dates of payment, April 28, 1952 and April 23, 1953.

* * *

6. Amount to be refunded: \$61,868.50.

* * *

8. The time within which this claim may be legally filed expires, under Section 910 of Internal Revenue Code on April 28, 1955.

The deponent verily believes that this claim should be allowed for the following reasons:

Statement Attached.

CALIFORNIA TRUST CO.,

By /s/ C. L. PATTERSON,

Trust Officer;

HUNT STROMBERG,

Executors of the Estate of Katherine Stromberg,
Deceased (Duly Appointed and Still Acting).

Subscribed and sworn to before me this 16th day of June, 1953.

[Seal] /s/ MYLA J. EMERSON,

Notary Public in and for the County of Los Angeles, State of California. [9]

Statement

On or about February 28, 1952, the undersigned, as co-executors of the Estate of Katherine Stromberg, Deceased, filed an Estate Tax Return Form 706 for said estate, which return showed a tax liability of \$17,017.58. The tax disclosed on said return was paid by the estate on April 28, 1952.

Subsequently, the estate received a letter dated January 28, 1953, signed by R. A. Riddell, Director of Internal Revenue, which letter notified the estate of certain adjustments or conclusions resulting from the examination of the Estate Tax Return filed. The adjustments or conclusions were set forth in a report attached thereto resulting in a proposed deficiency in estate tax of \$47,271.57. Thereafter, the undersigned, for and on behalf of the estate, executed Form 890, Waiver of Assessment of Tax, and filed said form with the Director of Internal Revenue at Los Angeles. Thereafter, the estate received a statement of estate tax due, dated April 13, 1953, which statement gave notice that estate tax of \$47,271.57 and interest of \$2,220.47 had been assessed to the estate. On April 23, 1953, the estate paid the amount of tax and interest demanded in said notice.

The estate contends, by and through the undersigned co-executors, that the assessment of the amount of tax as shown on the Estate Tax Return filed and the assessment of tax and interest as shown in the deficiency letter of January 28, 1953, were erroneous and/or illegal and that the taxes

paid pursuant to said accounts were erroneously and illegally collected. [10]

More particularly, the estate contends that (a) \$71,368.55, which is one-half of the cash surrender value of the insurance policies on the life of the surviving spouse of Katherine Stromberg, is not properly includible in the gross estate for estate tax purposes; and (b) \$148,266.41, which is the total bequests, etc., to the surviving spouse, but not in excess of one-half of the adjusted gross estate, is properly a deduction in computing the taxable estate for estate tax purposes.

The grounds on which the estate relies are as follows:

As to (a) above, the community interest if any of the decedent in life insurance and annuity policies of the surviving husband is not includible in the gross estate; see *Waechter et al. v. U.S.A.* 98 Fed. Sup. 960 (1951) affirmed C.C.A.—9, April 28, 1952.

As to (b) above, the estate is entitled to a deduction of one-half of the value of the adjusted gross estate passing to the surviving spouse: this deduction is not properly disallowed as a terminable interest or upon any other basis where the interest of the surviving spouse was actually distributed to him by order of the Probate Court within six months of the date of death of Katherine Stromberg. Complete title to such interest actually vested in the surviving spouse within six months of the death of Katherine Stromberg.

Wherefore, the estate, by and through the undersigned, respectfully requests the refund of the amount claimed together with interest thereon or such greater amount as may be legally refundable.

[Endorsed]: Filed January 13, 1954. [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled cause and in answer to plaintiffs' complaint, admits, denies, and alleges:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Admits the allegations contained in paragraph III of the complaint.

IV.

Admits the allegations contained in paragraph IV of the complaint.

V.

Admits the allegations contained in paragraph V of the complaint. [12]

VI.

For answer to paragraph VI, defendant admits that on June 19, 1953, plaintiffs filed with the de-

defendant a claim for refund of taxes and interest; that a purported copy of said claim is attached to the complaint and marked Exhibit A; that on November 24, 1953, defendant notified plaintiffs in writing that there were no grounds for reduction in tax liability as a result of the examination of the estate tax return and the claim for refund filed, and admits that a copy of the examining officer's report dated October 27, 1953, was attached to said notice. Except as otherwise admitted in this answer, all allegations contained in said refund claim, Exhibit A, are denied.

VII.

Admits the allegations of paragraph VII, and for further answer defendant states that registered notice of rejection of plaintiffs' claim for refund as forwarded to them on January 14, 1954.

VIII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph VIII of the complaint.

IX.

Denies the allegations contained in paragraph IX of the complaint.

X.

Denies the allegations contained in paragraph X of the complaint.

XI.

Admits the allegations contained in paragraph XI of the complaint.

XII.

Denies the allegations contained in paragraph XII of the complaint.

Wherefore, having fully answered, defendant prays for judgment [13] in his favor, for dismissal of plaintiffs' cause of action, for costs, and all other just and proper relief.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 14, 1954. [14]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Katherine and Hunt Stromberg were wife and husband and, at the time of the death of Katherine Stromberg on March 15, 1951, were residents of the County of Los Angeles, State of California. During their marriage the husband, Hunt Stromberg, purchased certain life insurance and annuity policies. The policies were selected by Hunt Stromberg and purchased by him from earnings received for per-

sonal services. He retained possession of the policies and had the right to change the beneficiary at will. [75]

Upon the death of Katherine Stromberg her will was admitted to probate, and the California Trust Company and Hunt Stromberg were appointed executors. The executors filed a Federal Estate Tax Return, disclosing a tax liability of \$17,017.58. The executors did not list in the assets of the estate any interest of decedent in the aforementioned policies.

In April, 1953, plaintiffs received notice from defendant that additional estate taxes in the amount of \$47,271.50 were due as, according to the Internal Revenue Department, the executors should have listed for estate tax purposes one-half of the cash surrender value of the insurance policies. The amount demanded was paid. A claim was duly filed for refund of the claimed overpayment, and subsequently this suit was filed.

Two problems are presented to the Court:

1. Did decedent, Katherine Stromberg, have an interest in the life insurance and annuity policies referred to above which interest should have been included in decedent's gross estate for estate tax purposes?

2. Was the estate of Katherine Stromberg, in computing the estate tax, entitled to a marital deduction for any portion of the property passing to her surviving spouse?

According to the stipulation of facts on file in this action, Mr. and Mrs. Stromberg at all material times were residents of the State of California, and the policies in question were purchased and paid for from earnings of Mr. Stromberg received by him for personal services. [76]

It seems hardly necessary to cite cases to the effect that in California (a community property state) the earnings of the husband during the marriage are community property—California Civil Code §164; *Thorp vs. Thorp*, 75 C.A. 2d 605; *Sbarbaro vs. Rosa*, 48 C.A. 2d 584—and that property purchased from such earnings is also community. The earnings of Hunt Stromberg for personal services rendered were community funds, and as a consequence this Court must find that the insurance policies purchased with such funds were community property. (*Union Mutual Life Insurance Company vs. Broderick*, 196 C. 497.)

In the State of California a wife has a one-half undivided interest in community property. It is true the husband retains possession and control of community personal property (California Civil Code §172); but the husband cannot devise the wife's interest in community property, either real or personal (California Probate Code §§201, 201.5). She has such an interest in community property that it is possible for her to will away her portion thereof and thus, at her death, cause a division of the community estate. (Probate Code §202.) The fact that the policies in question were retained by the hus-

band and that he had a right to change beneficiaries at will does not mean he could deprive the wife of her community interest therein without her consent. Inasmuch as Katherine Stromberg had a community interest in the policies at the time of her death, it will be the finding of this Court that the Commissioner of Internal Revenue was correct when he determined there should have been included in the gross estate of Katherine Stromberg, deceased, an undivided one-half interest in the cash surrender value of the policies in question. [77]

The second problem presents a more serious question. Although marital deduction was a part of the Revenue Act of 1948, the Court has been able to find only one case in which a Circuit Court has had occasion to pass upon "marital deduction." (*Kasper v. Kellar*, 217 F. 2d 744.)

According to the brief filed by plaintiffs in the case at bar, "the purpose of the marital deduction statute was to equalize the Estate Tax burden between community and separate property states." Prior to 1948 there had been considerable agitation throughout the country relative to discrimination in favor of residents of community property states who were able to divide the community income, filing separate tax returns based upon one-half of the community income to bring themselves within a lower surtax bracket. This privilege was not accorded to residents of non-community-property states and was recognized as unjust, for taxpayers should be treated indiscriminately, wherever resi-

dent; and we agree with the statement in plaintiff's brief to the effect that the marital deduction statute was to equalize in effect the tax burden between community and separate property states.

In community property states which allocate an undivided one-half interest in the community property there is no necessity for a marital deduction. In non-community-property states in which the wife does not have an undivided one-half interest in property there was a necessity for the marital deduction; so it seems to this Court from reading the very statute in question that the marital deduction does not apply to community property. It applies only to separate property. If the rule were otherwise, in California the wife would be entitled to her one-half undivided [78] interest in community property and then, if the executors were also entitled to a marital deduction, that deduction would be placed upon the exemptions of community property, and the injustice which existed prior to 1948 would continue to exist, even now. Certainly it was not the intent of Congress in passing the new law to continue in effect the injustice which they were trying to rectify by the Act of 1948. A reading of the statute in question certainly leads the Court to the conclusion that if Congress was trying to equalize the estate tax burdens between community and non-community property states, it would not allow a marital deduction on community property.

Regulations 105 covering Estate and Gift Taxes, §81.47a, provide in effect that the marital deduction

is generally not available in the event decedent's gross estate consists exclusively of property held by him and his surviving spouse as community property.

Concerning whether or not the insurance policies in question are community property, this Court holds they are.

Concerning whether or not plaintiffs are entitled to a marital deduction, this Court holds that as to the insurance policies plaintiffs are not entitled to such marital deduction.

However, if it should appear that there was separate property in the estate of Katherine Stromberg, then it is possible the estate would be entitled to a marital deduction, but that problem is not now before us.

Judgment is ordered in favor of defendant. Findings of Fact, Conclusions of Law and Judgment are [79] to be prepared by defendant for presentation to the Court for signature on or before December 12, 1955.

Dated this 1st day of December, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed December 1, 1955. [80]

United States District Court for the Southern
District of California, Central Division

No. 16183-HW Civil

CALIFORNIA TRUST COMPANY, et al.,

Plaintiffs,

vs.

ROBERT A. RIDDELL, etc.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT

This cause came on for hearing on December 5, 1955, before the Honorable Harry C. Westover, Judge, presiding, without the intervention of the jury. Plaintiffs were represented by their counsel, Wright, Wright, Green and Wright, through Loyd Wright and Charles A. Loring, and the defendant was represented by his counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Robert H. Wyshak, Assistant United States Attorney. The Court, having heard and considered all the evidence and stipulations of fact, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

This is an action for recovery of estate taxes assessed and paid pursuant to the provisions of the

1939 Internal Revenue Code, and jurisdiction is based on Title 28, U.S.C., Section 1340. [90]

II.

Katherine Stromberg died on March 15, 1951, a resident of the County of Los Angeles, State of California, and on May 8, 1951, in proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, designated as No. 316324 in the Probate files of said Court, Letters Testamentary were duly issued to California Trust Company and Hunt Stromberg, as Co-Executors of the Estate of Katherine Stromberg, and they are now, and at all times material hereto have been, the duly appointed, qualified and acting Executors of said estate.

III.

California Trust Company is, and at all material times was a California corporation, having its principal place of business in the County of Los Angeles, State of California. Hunt Stromberg is the surviving spouse of decedent, and is and at all material times was a resident of the State of California, maintaining his residence in the County of Los Angeles.

IV.

From May, 1950, to November 25, 1952, defendant was Collector of Internal Revenue for the Sixth Collection District of California. From November 26, 1952, to the present, the defendant has been, and now is, District Director of Internal Revenue for the Los Angeles District of California.

V.

On April 28, 1952, plaintiffs filed a Federal estate tax return for the estate of Katherine Stromberg, deceased.

VI.

The tax liability disclosed on said return, \$17,-017.58, was paid by plaintiffs to the defendant on April 28, 1952.

VII.

In April, 1953, plaintiff received a notice from defendant that additional estate taxes in the amount of \$47,271.57 and [91] interest in the amount of \$2,-220.47, a total of \$49,492.04, had been assessed against plaintiffs, for which demand was made. On April 23, 1953, plaintiffs paid defendant the said total of \$49,492.04, in payment of the additional estate tax and interest assessed and demanded.

VIII.

On June 19, 1953, plaintiffs filed with defendant a claim for refund of \$61,868.50.

IX.

In January, 1954, plaintiffs received a notice dated January 14, 1954, by registered mail, that plaintiffs' claim for refund had been disallowed.

X.

On March 15, 1951, the date of Katherine Stromberg's death, there were certain life insurance and annuity policies on the life of her surviving spouse, Hunt Stromberg. Katherine Stromberg was named

as beneficiary on each of the policies. Said policies had been purchased by Hunt Stromberg with community property and each and every premium thereafter was paid for with community property. On the date of her death, the decedent had a community interest in the cash surrender value of each of said policies which should have been included in the decedent's gross estate, but which was omitted therefrom in the federal tax return which was filed.

XI.

The last will and testament of the decedent contained the following provision:

"I give, devise and bequeath my entire estate of whatsoever kind and value and wheresoever situate unto my husband, Hunt Stromberg. Should he predecease me or fail to survive distribution of my estate, I give, devise and bequeath my entire estate to my son, Hunt Stromberg, Jr." [92]

XII.

On September 14, 1951, one day less than six months after the decedent's death, an order of partial distribution was entered in the Superior Court in and for the County of Los Angeles, probating said will. The decree of distribution distributed the entire estate to Hunt Stromberg and no mention was made therein as to that provision of the will that cited that the property should go to Hunt Stromberg, Jr., the son, in the event that the husband failed to survive distribution.

XIII.

In the federal estate tax return filed, a maximum “marital deduction” was claimed for the property passing to the surviving spouse, Hunt Stromberg.

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties thereto.

II.

The Commissioner of Internal Revenue properly included in the decedent’s gross estate her community interest in the cash surrender value of the life insurance and annuity policies on the life of her husband, Hunt Stromberg, at the time of her death under the provisions of Sec. 811 (a) of the 1939 Internal Revenue Code.

III.

The provisions of the decedent’s last will and testament determine whether the estate is entitled to a marital deduction within the provisions of Sec. 812 (e), rather than the Decree of Distribution.

IV.

The interest of the surviving spouse, Hunt Stromberg, in his wife’s estate was a “terminable interest” within the meaning of Sec. 812 (e) (1) (B) of the 1939 Internal Revenue Code and was not [93] within the exception provided for in Sec. 812 (e) (1) (D) of said Code. The surviving spouse’s interest created by the will was contingent interest, conditioned on his surviving actual distribution;

and his son, Hunt Stromberg, Jr., also had a contingent interest created by the will, which would take effect and be substituted for the devise to his father, if the latter did not vest.

V.

Under California law there would have been a lapse where the primary legatee (Hunt Stromberg) did not survive distribution and the gift over (to Hunt Stromberg, Jr.) would have vested at that time.

VI.

The Commissioner of Internal Revenue properly disallowed a marital deduction in determining the net estate of decedent.

Kasper v. Kellar,
217 F. 2d 744 (8th Cir. 1954)

VII.

The defendant is entitled to judgment against the plaintiff, dismissing the complaint herein with prejudice, and for his costs.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed:

That the plaintiffs take nothing by their complaint, that the above-entitled action be dismissed with prejudice, and that the defendant have judgment for, and shall, recover from plaintiffs the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of \$20.00.

Dated this 29th of December, 1955.

/s/ HARRY C. WESTOVER,
Judge.

Affidavit of service by mail attached.

[Endorsed]: Lodged December 27, 1955.

[Endorsed]: Filed December 29, 1955.

[Endorsed]: Docketed and Entered December 30,
1955. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the California Trust Company and Hunt Stromberg, executors of the estate of Katherine Stromberg, deceased, plaintiffs in the above-entitled action hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 30th day of December, 1955.

Dated: January 30th, 1956.

LOYD WRIGHT,
DUDLEY K. WRIGHT,
WRIGHT, WRIGHT, GREEN
AND WRIGHT,

By /s/ DUDLEY K. WRIGHT,
Attorneys for Plaintiffs
and Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed January 30, 1956. [96]

In the United States District Court, Southern
District of California, Central Division

No. 16183-HW Civil

CALIFORNIA TRUST COMPANY, et al.,

Plaintiffs,

vs.

ROBERT A. RIDDELL, etc.,

Defendant.

Honorable Harry C. Westover, Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiffs;

CHARLES A. LORING, Esq.

For the Defendant;

SIDNEY MACHTINGER.

September 12, 1955—10:00 o'Clock A.M.

The Clerk: No. 11, 16183, California Trust Company, et al., vs. Robert A. Riddell, etc., for setting.

Mr. Loring: Ready for the plaintiffs.

Mr. Machtinger: Ready for the defendant.

Mr. Loring: We have a pretrial statement. The case will be submitted fully on briefs. The plaintiff would like one hour to offer further comments and exhibits.

The Court: If you want to file your briefs——

Mr. Loring: I am prepared to file the plaintiffs' brief now, if the court will specify time for defendant's brief and the closing brief.

The Court: How much time will the defendant need?

Mr. Machtinger: The cases are being handled by Mr. Wyshak, who is out of town this week. If we could have the one hour time necessary after this week——

The Court: I can't give you any time until after October 1st. I am going to have to work you in between the criminal cases. If you will come in October 3 or October 10, I will be glad to set the matter down for hearing.

Mr. Loring: May I suggest it would probably be most expeditious if we can file the briefs before the hearing.

The Court: Yes. I would like to have your briefs filed so I can read the briefs and determine what the points of law are. [2*]

Mr. Loring: We would suggest 30 days for the defendant and 20 days for the plaintiff to reply.

The Court: Is that satisfactory?

Mr. Machtinger: That is satisfactory.

The Court: Such is the order.

The matter will be submitted on briefs. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of January 1956. [4]

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed May 31, 1956.

December 5, 1955, 3:00 P. M.

Appearances:

For the Plaintiffs:

DUDLEY WRIGHT, Esq.,
CHARLES A. LORING, Esq.,
CLAYTON HURLEY, Esq.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney, by
ROBERT H. WYSHAK,
Assistant United States Attorney.

The Clerk: No. 16,183-HW Civil, California Trust Company vs. Robert A. Riddell, further proceedings.

Mr. Loring: Ready for the plaintiff, your Honor.

Mr. Wyshak: Ready for the defendant, your Honor.

Mr. Wright: Mr. Loring wanted to offer a stipulation.

Mr. Loring: It isn't necessary for me to take it out of the file.

The Clerk: You can't take it out, but I can mark it.

Mr. Loring: I should like to offer in evidence, if the court please, as the plaintiffs' first exhibit in order a pre-trial stipulation filed in this case September 12, 1955.

The Court: It may be received and marked Plaintiffs' Exhibit 1.

The Clerk: Plaintiffs' Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 1.)

Mr. Loring: I should like next to offer in evidence as Plaintiffs' Exhibit 2 a supplemental pre-trial stipulation signed this date by counsel for both sides.

Mr. Wyshak: Your Honor, with respect to this pre-trial stipulation——

The Court: Are you talking about No. 1 or No. 2?

Mr. Wyshak: The supplemental or, rather, Exhibit 2 for [2*] identification. I should like to object on the grounds that——

The Court: Have you stipulated to it?

Mr. Wyshak: We reserved our objection, your Honor. I object on the grounds that the tax return speaks for itself and what the Commissioner of Internal Revenue determined is irrelevant and immaterial to the issues in this action.

The Court: Now, you say the Commissioner of Internal Revenue determined all the property was separate property. How about the insurance policies?

Mr. Loring: That is covered, if you will finish reading.

The Court: The objection is overruled. It may be filed. It is received as Exhibit 2.

The Clerk: Exhibit 2.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 2.)

The Court: Now, I understand from this stipulation that all the property was separate property with the exception of the insurance policies.

Mr. Loring: And the residence and the furnishings thereof.

The Court: The residence and furnishings.

Mr. Loring: That's right.

The Court: All the other property was separate property.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Loring: That's right.

Mr. Wyshak: The Commissioner so determined, your Honor. [3]

The Court: You are not going to dispute the Commissioner's determination, are you?

Mr. Wyshak: Well, I don't intend to dispute it, your Honor, but I am not conceding that we are bound by the determination.

The Court: All right.

Mr. Loring: I should like next to offer in evidence as Plaintiffs' Exhibit 3 a certified copy of the entire proceedings in the probate of the estate of Katherine Stromberg in the Superior Court of California and for the County of Los Angeles, being No. 316324 in the records and files of that court, excluding only the copies of the last will and testament that appear in this certification.

The Court: How about the last will and testament? Do you think that ought to be part of the record?

Mr. Loring: I should like to explain this to your Honor. At the time this document was certified, I ordered the entire probate proceedings, but in researching the law of this case, as my briefs on file here disclose, I find the law of California to be that the succession to the estate, that is to say, the question of whether or not the surviving spouse acquired a terminable interest in the estate is to be determined exclusively by the decree of distribution in the estate and the court is not entitled to look at the last will and testament any more than

it is entitled to look into any other evidence [4] upon which a judgment is based.

The Court: Supposing I would disagree?

Mr. Loring: That is your Honor's privilege.

The Court: Suppose I thought I should look at the last will and testament.

Mr. Loring: If your Honor would permit me to make the offer in this form, I assume that the government counsel will offer the will.

The Court: Have you got a copy, certified copy?

Mr. Loring: It is a part of this document, your Honor.

The Court: Is it a part of that document?

Mr. Loring: It is, your Honor, but I am not offering it as a part of my offer.

The Court: All right.

Mr. Wyshak: Your Honor, I am going to object on the ground that the file, with the exception as noted by counsel, is irrelevant, incompetent and immaterial to the issues in this case.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiffs' Exhibit 3.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3.)

The Court: That is with the understanding I will entertain a motion by the government at the proper time to admit in evidence a copy of the last will and testament. [5]

Mr. Loring: Yes, your Honor. I should like to

next offer into evidence a photostatic copy of the estate tax return in this matter filed by the plaintiff.

The Court: It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 4.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 4.)

Mr. Loring: I should like next to offer as Plaintiffs' Exhibit in evidence the photostatic copy of the report of the agent for the Internal Revenue Department dated January 28, 1953.

Mr. Wyshak: I will object to that, your Honor, as irrelevant and immaterial.

The Court: Overruled. It may be admitted in evidence.

The Clerk: Plaintiffs' Exhibit 5.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 5.)

Mr. Loring: I should like next to offer in evidence a photostatic copy of the notice of deficiency estate tax sent by the Department to the plaintiff.

Mr. Wyshak: Your Honor, I will object to that as immaterial on the ground we have already stipulated a tax was paid and the amount.

The Court: I know, but what difference does it make?

Mr. Wyshak: That is exactly my point. It doesn't make any difference. [6]

The Court: Overruled. It may be admitted in evidence.

The Clerk: Plaintiffs' Exhibit 6.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 6.)

Mr. Loring: I should like next to offer in evidence, if the court please, a photostatic copy of the claim for refund prepared by the plaintiff and submitted to the defendant.

Mr. Wyshak: Your Honor, I will withhold an objection if counsel will specify that his offer is merely to show that the claim was timely and that the grounds for the claim are the same as the grounds for this suit, that any statements therein are not to be accepted for the truth of the matter asserted.

The Court: He has only offered it as a claim filed.

Mr. Wyshak: As far as I know, he hasn't specified what his offer is for.

The Court: Showing that the claim was filed. I am not receiving it as evidence of the truth of the claim. I am receiving it only as evidence they made a claim to the government.

Mr. Wyshak: Then I have no objection, your Honor.

The Court: It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 7.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 7.)

Mr. Loring: I should like to next offer in evidence, if [7] the court please, a photostatic copy of the determination by the Internal Revenue Department dated November 24, 1953, denying the claim for refund.

The Court: It may be received in evidence.

Mr. Wyshak: May I see that?

Mr. Loring: I might say, if the court please, that I have furnished counsel with photostatic copies of all of these documents.

Mr. Wyshak: Your Honor, I will object to this for the reason that the official disallowance of the claim for refund is the only thing which causes jurisdiction to vest in this court and the revenue agent's determination with respect to the claim for refund is irrelevant and immaterial.

The Court: Overruled. It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 8.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 8.)

Mr. Loring: May I have just a moment, your Honor? If the court please, I should like to call very briefly as a witness for the plaintiff Mr. Hunt Stromberg.

The Court: Come forward. [8]

HUNT STROMBERG

called as a witness by and on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please, and state your name?

The Witness: Hunt Stromberg.

Direct Examination

By Mr. Loring:

Q. Mr. Stromberg, you are one of the plaintiffs in this action? A. Yes.

Q. Were you married to the decedent, Katherine Stromberg? A. Yes.

Q. When did you marry the decedent?

A. Well, it was——

Q. Approximately.

A. Approximately 41 years ago, whatever that date would be.

Q. How long did you live in the State of California?

A. Lived in the State of California since, oh, approximately 1919.

Q. Since 1919? [9] A. Yes.

Q. Continuously? A. Yes.

Q. You and the decedent? A. Yes.

Q. At the time you came to California in 1919, did you and your wife have any property?

A. No.

Q. Was all of the property which you and your wife acquired since your marriage acquired as a

(Testimony of Hunt Stromberg.)

result of your personal services within the State of California? A. Yes.

Q. During your marriage to the decedent Katherine Stromberg, did you give her certain properties—strike that.

Did you give the decedent any money?

A. Yes.

Q. Do you know approximately when you gave her money for the first time, any substantial amount?

A. I don't think offhand, without looking at the records, that I could give you that date.

Q. Can you give it to us approximately?

A. Oh, I would say, my wife passed away in 1951, and I would imagine it was maybe 10 or 12 years prior to that. As I say, I wouldn't be too accurate on that, on the dates. I did on several occasions, however, give her money. [10]

Q. Did you file and pay a gift tax return in connection with those moneys that you paid your wife?

A. It is my understanding that we did, yes.

Q. Do you know what your wife did with those moneys?

A. Yes. I know that my wife bought certain stock and also two annuity policies. I can't recall now the exact company, but insurance policies, annuities, and she might have bought jewelry, also.

Q. I direct your attention to a schedule of stocks and bonds that appear annexed to Schedule B of the estate tax return that has been received in evidence in this matter, and ask you if that is a sched-

(Testimony of Hunt Stromberg.)

ule of stock and bonds which your wife purchased with the money which you gave her during your marriage? A. I believe it is.

Q. I direct your attention to another page of that exhibit, I believe it is Schedule C or F—Schedule F, items 10 and 11, which describe policies issued by the Manufacturers Life Insurance Company of Toronto, Canada, for the principal amount of \$50,000, and ask you if you know those are policies which your wife purchased with the money which you gave her.

A. Yes. I am clear on that, very definitely.

The Court: May I inquire, was this stock issued in the name of any person or persons?

Q. (By Mr. Loring): Do you know whether this stock was [11] issued in your name or in your wife's name or both of you, or somebody else?

A. As I recall it, we had three accounts. One account was tenants in common, and another account was in my wife's name, and then we had an account at the California Trust Company in my name. I believe the stock that she purchased directly with money I had given her, they were made out directly in her name when they were received, but again, as I say, that has been a long time ago, and to be accurate, I believe the California Trust Company could answer that better than I could, because they had charge of my affairs.

Mr. Loring: I have no further questions.

The Court: I understand, then, that when you

(Testimony of Hunt Stromberg.)

and your wife came to California you didn't have any property?

The Witness: No, your Honor.

The Court: Except nominal. You made it all here.

The Witness: Yes.

The Court: And during the years you gave some of the money you were making, a certain amount of money to your wife?

The Witness: That's right.

The Court: And she bought stock with it?

The Witness: That's right.

The Court: All right.

The Witness: And the insurance policies. [12]

Mr. Loring: May the record show that the estate tax return concerning which I was examining the witness is Plaintiffs' Exhibit 4 in this case?

The Court: Any questions? May I inquire, the income tax returns that were prepared, were they joint returns or separate returns?

Mr. Loring: I will ask the witness that question.

Q. Do you know, Mr. Stromberg?

A. I believe they were joint returns.

The Court: And this income from this stocks and bonds was put in the joint account?

The Witness: I couldn't answer that accurately. I believe that the income from the stocks that were in my wife's name went directly to her. That is my recollection.

The Court: It is not a question of where they

(Testimony of Hunt Stromberg.)

went. I want to know how she reported it on her income tax return.

The Witness: Well, that would be of record. We certainly have records of all the income tax returns but, as I say, I just don't know—my memory on that, on those details, is not too good, but we have very clear records and I could certainly show you.

Cross-Examination

By Mr. Wyshak:

Q. Directing your attention to Schedule E of Exhibit 4, [13] the estate tax return, headed Jointly Owned Property, an account in the Farmers & Merchants Bank, do you know the source of those funds? A. What year was that?

Q. That was the year of her death or at the time of her death.

A. At the time of her death? Well, is that a joint account?

Q. It is listed under Jointly Owned Property.

A. I wouldn't know. I could get you that information. The man who handles those things for me could tell you. I would imagine—did you say that was under her name?

Q. I don't know in whose name it is. It is listed as a jointly owned account.

A. She might have put the money in there from money I had given her. I really don't know, but I could acquire that information for you.

Q. Directing your attention to Schedule C of

(Testimony of Hunt Stromberg.)

the said exhibit headed Mortgages, Notes and Cash, there are five items of cash or bank deposits. Was that money you had given her or the result of dividends which she had received on stocks in her name?

A. I would imagine it was the receipts of dividends she had received, that money that was in her safety deposit box, because she put it in there. I know that. I did not know it [14] was in there until we opened the box.

Q. How about the money in her commercial account in the California Bank in Beverly Hills?

A. It was only \$145. It was household money, perhaps. It looks like it is household money.

Mr. Loring: We can't hear the witness, your Honor.

The Witness: Pardon me?

Mr. Loring: We can't hear you.

The Witness: I say it is \$147 in the California Bank. It looks to me like that is household money that she might have used for a household checking account. I know she did banking there.

Q. (By Mr. Wyshak): How about the checked items on that schedule?

A. It appears to me those were dividends that came to her from the stocks she had. It looks that way to me.

Q. This is the estate tax return?

A. It looks to me like that is what it is.

Q. You would say there was the same source

(Testimony of Hunt Stromberg.)

for the money on deposit with the California Bank Nos. 3 and 4?

A. I would imagine that is—well, pardon me. It is probably money she put in there.

Q. And also——

A. But whether it came from dividends or whether I gave it to her, right now I wouldn't be able to remember. [15]

Q. Would that be your answer with respect to the \$811.57 item?

A. Yes, it would, because I imagine that might have come in from the dividends on the stocks she had.

Mr. Wyshak: Your Honor, I offer to stipulate that Schedule F of Exhibit 4, the estate tax return, typed Schedule F, headed Other Miscellaneous Property, that items 2 through 9, starting with the 1937 Packard and, 9, the yellow metal stickpin, that the items there listed are separate property.

Mr. Loring: And were separate property of the deceased at the time of her death. So stipulated.

Mr. Wyshak: No other questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Loring: We have no further evidence to offer, if the court please. The plaintiff rests.

Mr. Wyshak: The government has no evidence, your Honor.

The Court: How about the last will and testament? I want that in the record. I accepted the

plaintiffs' offer with the understanding the government was going to introduce in the record the last will and testament. They excluded that from their offer. They have only introduced the decree of distribution.

Mr. Wyshak: Insofar as we are concerned, your Honor, it [16] is up to the plaintiff to come into court and prove their case and prove they are entitled to the refund.

The Court: I know, but the plaintiff says it doesn't make any difference what the will says, that it is the decree of distribution that counts. If you are willing to stipulate that, that will simplify the case.

Mr. Wyshak: I am not willing to stipulate that.

The Court: Then you better introduce your copy of the last will and testament.

Mr. Wyshak: I think the burden of proof is on the plaintiff, your Honor. I feel that their proof would be deficient in that regard.

The Court: I think I am entitled to have the will before me. Do you have any objection to having the will introduced?

Mr. Wyshak: I have no objection.

The Court: Then make your offer. I want it before me. I want to consider it.

Mr. Wyshak: I don't want it as part of my case, your Honor. It is up to the plaintiff to do it. I feel their proof is deficient if they don't offer the will.

The Court: Now, Mr. Wyshak, they say it doesn't make any difference what the will and testa-

ment says, the thing that controls in California is the decree of distribution. I have only the decree of distribution. If you don't offer the will, I will rule against the government on that proposition [17] right now, if you don't want to offer the will.

Mr. Wyshak: All right, your Honor, I will offer the will appended to Exhibit 3 as our Exhibit A.

Mr. Loring: To which offer we object on the ground it is incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues of this case, and an attempt to impeach a final judgment of the State court by which this court is bound.

The Court: Overruled. It may be received.

The Clerk: Is this the last will and testament of Katherine Stromberg?

Mr. Wyshak: Yes.

The Clerk: Government's Exhibit A.

(The document referred to was received in evidence and marked as Government's Exhibit A.)

The Court: That is one of the issues to be determined in this lawsuit here. If I sustained an objection, then I would have determined right now that it is the decree of distribution and not the will.

Mr. Loring: May I be heard briefly in oral argument, your Honor?

The Court: Yes. I don't want to foreclose you. I almost foreclosed you the other day. I don't want to commit the same error twice.

Mr. Loring: In your Honor's opinion in this matter, you [18] stated at the end, if I may call the court's attention to it——

The Court: I have it.

Mr. Loring: Page 5, line 25. "However, if it should appear that there was separate property in the estate of Katherine Stromberg, then it is possible the entire estate would be entitled to marital deduction, but that problem is not now before us."

May I call the court's attention to Schedule M of the estate tax return, Plaintiff's Exhibit 4 in evidence. The taxpayer returned the entire estate on the basis that it was community property. Inasmuch as the entire estate is community property, the taxpayer took a deduction of \$148,226.41. Now, may I call the court's attention to the agent's report.

The Court: Now, just a minute, before we get to the agent's report. You come in and you file a schedule with the government. I say you, but I don't know who filed it. The plaintiff filed a schedule with the government.

Mr. Loring: Yes, your Honor.

The Court: They say all this property is community property, and now you come into court and say only a very small part is community property.

Mr. Loring: The reason for that I will call the court's attention to in a moment, if I may.

The Court: All right.

Mr. Loring: The agent's report, dated January 28, 1953—— [19]

The Court: May I have the report? What is the exhibit number?

Mr. Loring: I believe it is Exhibit 5, January 28, 1953.

The Court: All right.

Mr. Loring: I believe it is page 5, under Schedule 1(b), it explains the changes in deductions. They have set up in the left-hand column a schedule of what the agent determines was the separate property of the deceased with reference to the schedules of the estate tax return. Schedule A, under separate property, \$42,500 under community property. That was the residence of the parties.

Schedule B, the item of \$150,726.72 is the schedule of stocks and bonds.

Schedule C, \$4,354.42, are these little items of cash, mortgages, notes and cash.

Schedule F is an item of \$104,419.94, the miscellaneous and other miscellaneous property, and as to that they determine that half of the furniture, furnishings, clothing, and so forth, being in the sum of \$4,593, was community property, and the balance of the miscellaneous items were separate property.

Now, we find ourselves in this situation. The taxpayer has filed an estate tax return on the basis of community property. The Commissioner has determined, after investigation, that the bulk of the property was separate property. We are not [20] going to quarrel with the determination of the Commissioner that it was separate property, for this reason. We take the position, and I think correctly so, that this taxpayer is entitled to the deduc-

tion if it is community property, and we are entitled to the deduction if it is separate property, unless it is separate property and the estate which the surviving spouse acquired was a terminable interest, and as to that we then come down to a question of law. As to that, we have briefed it. We have told your Honor we believe that the husband did not acquire a mere terminable estate, that he acquired a complete estate under the wording of the will, if the will is proper, and under the decree of distribution, in any event.

In other words, your Honor, we believe that the probate file now in evidence in this case proves that this surviving spouse did not have a terminable estate in his wife's estate. Therefore, it being separate property by the determination of the Commissioner, this surviving spouse is entitled to marital deduction, and the Commissioner committed error in disallowing such marital deduction.

The Court: What did you tell me F was on this exhibit?

Mr. Loring: Miscellaneous property, your Honor.

The Court: F is miscellaneous property?

Mr. Loring: Yes, your Honor.

The Court: Mr. Wyshak, are you going to contest this, are [21] you going to argue that the property as set up in this schedule as the wife's separate property is not in truth separate property?

Mr. Wyshak: No, I am not, your Honor.

The Court: You are willing to accede to the determination of the Commissioner?

Mr. Wyshak: I am, your Honor.

The Court: So we can assume, then, that is separate property and we don't have to worry about whether it is community or separate property?

Mr. Wyshak: Yes.

The Court: All right.

Mr. Wyshak: I am going to direct my argument and reply to Mr. Loring's closing argument, your Honor. I think the plaintiff has misconstrued two different subsections of this matter. This says that the estate of the husband will allow for marital deduction if it is sure to vest within six months. In other words, if there was a common disaster clause saying that he has to survive her by five months or by six months.

The Court: If the decree of distribution is controlling, then he would get a whole interest within the six months period.

Mr. Wyshak: There is no question about it, but I was assuming that the decree of distribution doesn't control. I will argue that, if you like. [22]

The Court: I don't care whether you argue it or not.

Mr. Wyshak: I was coming to that eventually. I will argue it first if you prefer.

We are not concerned with how Hunt Stromberg got title to the property. The question here is what did the decedent do in her lifetime to create an interest. The government was not a party to the probate proceedings. There could be all sorts of conclusions.

The Court: Well, I have read your brief. Is that all in there?

Mr. Wyshak: Well, I am not sure.

Mr. Loring: That is all in there.

The Court: Yes, I think it is. Do you want to reply any further?

Mr. Loring: Just one word, your Honor. Our position in the matter is that subsection (d) of Section 8(12) doesn't come into play in this case at all, because under Section B this was not a terminable interest because even under the will no estate passed to any person other than the surviving spouse, and in any event the probate record which is now in evidence in this case shows that all of the separate property in the estate was in fact distributed to and vested in the husband within six months of death.

Mr. Wyshak: Just in passing, your Honor, I would like to point out that appended to the estate tax return, which is [23] in evidence as Exhibit 4, is a copy of the will and not the decree of distribution. That is appended to the estate tax return.

The Court: All right. I will take the matter under submission.

Mr. Wyshak: Thank you.

The Court: Now I can decide this case, can't I, without any further proceeding?

Mr. Loring: I hope so, your Honor.

The Court: Court will now stand in recess until 10:00 o'clock tomorrow morning. [24]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of March, 1956.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 99, inclusive, contain the original

Complaint;

Answer;

Pre-trial Stipulation;

Trial Brief;

Defendant's Trial Brief;

Plaintiff's Closing Trial Brief;
Defendant's Reply Brief;
Decision;
Supplemental Pre-trial Stipulation;
Supplemental Memorandum re Marital Deduction;
Findings of Fact, Conclusions of Law and Judgment;
Notice of Appeal;
Designation of Contents of Record on Appeal;

and a full, true and correct copy of the minutes of the Court on September 12, 1955; which, together with Plaintiff's Exhibits 1 through 5, inclusive, and reporter's transcript, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 1st day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15,153. United States Court of Appeals for the Ninth Circuit. California Trust Company and Hunt Stromberg, Executors of the Estate of Katherine Stromberg, Deceased, Appellants, vs. Robert A. Riddell, Director of Internal Revenue and Formerly Collector of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,153

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
Katherine Stromberg, Deceased,

Petitioners,

vs.

ROBERT A. RIDDELL, Director of Internal
Revenue and Formerly Collector of Internal
Revenue for the Sixth District of California,

Respondent.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

Pursuant to this Court's Rule 17.6, your Petitioner herewith states the points on which he intends to rely and designates those portions of the record which he deems material to this appeal.

Your Petitioner claims that the United States District Court for the Southern District of California, Central Division, erred:

1. In holding that the Commissioner of Internal Revenue properly included in the decedent's gross estate one-half of the cash surrender value of the life insurance and annuity policies on the life of her surviving spouse under the provisions of Section 811(a) of the Internal Revenue Code of 1939.

2. In failing to hold that no part of the life insurance and annuity policies on the life of a husband are includable in the gross estate of a spouse who predeceases him.

3. In holding that the Commissioner of Internal Property disallowed a marital deduction in determining the net estate of the decedent spouse.

4. In failing to hold that the decedent's estate was entitled to a marital deduction in determining the decedent's net estate.

5. In holding that the decedent's estate was not entitled to a refund of \$61,868.50 for overpayment of estate taxes.

6. In failing to hold that the decedent's estate was entitled to a refund of \$61,868.50 for overpayment of estate taxes.

Your Petitioners hereby designate the following portions of the record for printing as material to the appeal:

1. Docket Entries.
2. Complaint.
3. Answer.
4. Transcript of Proceedings.
5. Exhibits 1-8, and A.
6. Memorandum Opinion Filed December 1, 1955.
7. Findings of Fact, Conclusions of Law and Judgment.
8. Notice of Appeal.
9. Statement of Points and Designation of Record.
10. Certificate and Seal.

With respect to designation 5 above, you are advised that Petitioners intend to apply to the above-entitled Court for an order directing that all of the exhibits transmitted by the Clerk of the District Court be considered in their original form without printing.

LOYD WRIGHT,
DUDLEY K. WRIGHT,
WRIGHT, WRIGHT, GREEN
AND WRIGHT,

By /s/ DUDLEY K. WRIGHT,
Attorneys for Plaintiffs and
Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1956.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR
CONSIDERATION OF ORIGINAL EX-
HIBITS

It Is Hereby Stipulated by and between petitioners and respondents, through their respective attorneys of record, that subject to the approval of this Honorable Court the original Exhibit 3 in the above-entitled cause except for that part which comprises the Decree of Distribution of the Estate of Katherine Stromberg, which exhibit has been transmitted to this Court by the Clerk of the United

States District Court for the Southern District of California, Central Division, may be considered by this Honorable Court in its original form without printing.

Petitioners and respondents, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original Exhibit 3 with the exception noted above, be considered by this Honorable Court on this appeal in its original form without printing.

April 16, 1956.

LOYD WRIGHT,
DUDLEY K. WRIGHT,
WRIGHT, WRIGHT, GREEN
AND WRIGHT,

By /s/ DUDLEY K. WRIGHT,
Attorneys for Petitioners.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant U. S. Attorney;

/s/ ROBERT H. WYSHAK,
Attorneys for Respondents.

[Endorsed]: Filed April 17, 1956.

No. 15153

United States
Court of Appeals
for the Ninth Circuit

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
KATHERINE STROMBERG, Deceased,

Appellants.

vs.

ROBERT A. RIDDELL, Director of Internal Revenue and Formerly Collector of Internal Revenue for the Sixth District of California,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

AUG 17 1956



No. 15153

United States
Court of Appeals
for the Ninth Circuit

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
KATHERINE STROMBERG, Deceased,
Appellants.

vs.

ROBERT A. RIDDELL, Director of Internal Revenue and Formerly Collector of Internal Revenue for the Sixth District of California,
Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.



United States District Court for the Southern
District of California, Central Division

No. 16,183-HW

CALIFORNIA TRUST COMPANY and HUNT
STROMBERG, Executors of the Estate of
KATHERINE STROMBERG, Deceased,

Plaintiffs,

vs.

ROBERT A. RIDDELL, Director of Internal
Revenue and Formerly Collector of Internal
Revenue for the Sixth District of California,

Defendant.

SUPPLEMENTAL MEMORANDUM
RE MARITAL DEDUCTION

This case was submitted to the Court upon a written stipulation of facts, from which stipulation the Court was of the opinion that only two questions were before it for decision:

1. Were the insurance policies in controversy community property; and
2. Were plaintiffs entitled to a marital deduction as to such community property? [83*]

In the opinion filed in this case on December 1, 1955, the Court held the insurance policies in ques-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

tion were community property but the marital deduction statute did not apply to community property. The opinion also stated that if it should appear there was separate property in the estate of Katherine Stromberg, deceased, then the estate would possibly be entitled to a marital deduction.

The case was reopened after filing of the opinion of December 1st, for the purpose of allowing plaintiffs to present additional evidence, which evidence now indicates that the estate consisted not only of community property but also of separate property of decedent.

It is agreed by the parties hereto that the marital deduction provision of the 1948 Internal Revenue Act was inserted for the purpose of equalizing tax burdens between community and non-community property states. To hold that a marital deduction does not apply to community property does not necessarily mean that one is not entitled to a marital deduction if there is separate as well as community property in the estate. To say that a marital deduction applies only if the estate consisted of separate property and does not apply if the estate consisted of both community and separate property would certainly be contrary to the intent of Congress. Consequently, we are of the opinion that a marital deduction is applicable in an estate in which there is separate property, even though that estate might also contain community property.

The Last Will and Testament of decedent, Katherine Stromberg, contained the following provision: [84]

“I give, devise and bequeath my entire estate
* * * unto my husband, Hunt Stromberg.
Should he predecease me or fail to survive distribution of my estate, I give, devise and bequeath my entire estate to my son, Hunt Stromberg, Jr.”

The estate was distributed within the statutory period. The Decree of Distribution distributed the entire estate to Hunt Stromberg, husband of decedent, and no mention was made therein as to that provision of the Will which recited that the property should go to Hunt Stromberg, Jr., the son, in the event the husband failed to survive distribution.

In the hearing at bar plaintiffs objected to introduction into evidence of a certified copy of the Last Will and Testament of decedent, upon the theory that the Decree of Distribution controlled in California and not the Will's provisions and even though the Will provided the husband was not to succeed to the estate if he did not survive its distribution that was of no moment, because distribution was actually made to the husband. Plaintiffs cite to the Court many authorities to the effect that the controlling factor in California is the Decree of Distribution of the Probate Court.

We find no fault with the position taken by plaintiffs nor with the decisions of the California courts, but this action arises under the Federal taxing statutes. As heretofore pointed out, the marital deduction provision was inserted in the

Revenue Act of 1948 for the purpose of equalizing taxes between residents of community and non-community property states. In other words, it was the intent [85] of Congress that there should be a uniform rule applicable in all states. The question of uniformity of the taxing authority has been passed upon often by the Supreme Court, and it has held on many occasions that the Federal Acts applied and not the laws of the local jurisdiction.

In *Burnet, etc., vs. Harmel*, 287 U. S. 103, in passing upon the question of payment of oil and gas lease bonuses under Texas law, the Supreme Court said, at page 110:

“Here we are concerned only with the meaning and application of a statute enacted by Congress, in the exercise of its plenary power under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation.”

Again, in *Lyeth vs. Hoey*, 305, U. S. 188, at 193, the Supreme Court said:

“In the instant case, the Court of Appeals applied the Massachusetts rule, holding that whether the property was received by way of inheritance depended ‘upon the law of the juris-

diction under which this taxpayer received it.' We think this ruling was erroneous. The question as to the construction of the exemption in the federal statute is not determined by local law." [86]

In *Morgan vs. Commissioner*, 309 U. S. 78, the Supreme Court, at page 80, said:

"State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

In *Estate of Rogers vs. Commissioner*, 320 U. S. 410, at page 414, again speaking upon this most important question, the Supreme Court said:

"Whether by a testamentary exercise of a general power of appointment property passed under § 302(f) is a question of federal law, once state law has made clear, as it has here, that the appointment had legal validity and brought into being new interests in property * * * Were it not so, federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation."

From the foregoing, we are of the opinion that the Federal Government is not restricted to the rule as established in California relative to the Decree of Distribution but, in determining tax liability, may refer to the provisions of the Will. The problem is, then, whether under the language

of the Will plaintiff is entitled to a marital deduction as to separate property of the estate.

As pointed out in our prior opinion, there is only one case decided by the Circuit Court which has any [87] bearing on this matter—*Kasper vs. Kellar*, 217 F.2d 744. In that case the Will provided that distribution was to be made to the devisees “if living at the time of distribution of my estate.” The evidence showed that the administration of the estate had been consummated and distribution of its assets made within six months after decedent’s death, and that the widow was living at the time. The district court took the view that the occurring of the events and the removal of the contingencies within the period of six months after decedent’s death were sufficient under the statute to establish the right to the marital deduction. However, the Circuit Court disagreed and said, at page 746, [quoting the Commissioner’s letter to the estate]:

“‘The fact that distribution actually took place within the six months’ period is immaterial since subsection (D) applies only if on the date of the decedent’s death it is certain that the surviving spouse’s interests will become absolute if she survives such six-months’ period. As of the date of the decedent’s death there was no certainty that within the six-months’ period the spouse’s interests would become absolute inasmuch as it was possible that distribution might not have been made within six months of death.’

“There can be no question as to the right of Congress to make any contingency, legal or testamentary, to which the transmitting of a decedent’s property is subject, the basis of a difference in estate-tax liability. Such a contingency, therefore, can as properly [88] be made to consist of an existing legal possibility as of an existing fact condition. Whatever the selected contingency may be, it necessarily may be made admeasurable for tax purposes as of the time of the decedent’s death. (Citing cases.) And when the contingency is so admeasurable and then exists, whether it has been made one of legal possibility or of fact certainty, it will not alter the situation that the contingency has thereafter ceased to exist, even though this occurs before the estate tax itself is payable.”

From the above it can be ascertained that the Circuit Court (Eighth Circuit) sustains the Commissioner in holding that if the Will contains a provision to the effect that the devisee must be alive at the time of distribution of the estate, the estate is not entitled to a marital deduction.

We agree with the decision of the Commissioner in the estate at bar and hold that under the facts of this case plaintiffs are not entitled to the marital deduction as claimed.

Findings of fact, conclusions of law and judgment are to be prepared for presentation to the

Court for signature on or before December 28, 1955.

Dated this 14th day of December, 1955.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed December 14, 1955. [89]

[Endorsed]: No. 15153. United States Court of Appeals for the Ninth Circuit. California Trust Company and Hunt Stromberg, Executors of the Estate of Katherine Stromberg, Deceased, Appellants, vs. Robert A. Riddell, Director of Internal Revenue and Formerly Collector of Internal Revenue for the Sixth District of California, Appellee. Supplemental Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: June 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15155

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT O. BLAND,

Appellant,

vs.

C. C. HARTMAN, as a Rear Admiral of the United States Navy and Commandant of the Eleventh Naval District of the United States Navy, and individually, WILLIAM H. SANDERS, JUNIOR, as a Captain of the United States Navy, and individually, JOE B. RENFRO, JUNIOR, as a Commander of the United States Naval Reserve, and individually, JAMES E. DYER, JUNIOR, as a Lieutenant Commander of the United States Naval Reserve and individually, and HEBER S. LEWIS, as a Lieutenant Commander of the United States Navy, and individually,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Southern Division.

BRIEF FOR APPELLEES.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
*Assistant U. S. Attorney,
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EDWIN H. ARMSTRONG,
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Los Angeles 12, California,
Attorneys for Appellees.

FILED

OCT 30 1956

PAUL F. GRIEN, CLERK

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No. 15155

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT O. BLAND,

Appellant,

vs.

C. C. HARTMAN, as a Rear Admiral of the United States Navy and Commandant of the Eleventh Naval District of the United States Navy, and individually, WILLIAM H. SANDERS, JUNIOR, as a Captain of the United States Navy, and individually, JOE B. RENFRO, JUNIOR, as a Commander of the United States Naval Reserve, and individually, JAMES E. DYER, JUNIOR, as a Lieutenant Commander of the United States Naval Reserve and individually, and HEBER S. LEWIS, as a Lieutenant Commander of the United States Navy, and individually,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Southern Division.

BRIEF FOR APPELLEE.

Counter-statement of the Case.

This is an appeal by the plaintiff below from an order granting the motion of the defendants below to dismiss the complaint [Tr. 36].* Appellant was a commissioned officer in the United States Naval Reserve and served on active duty from 1942 to February 22, 1946, at which time he was *honorably separated from active duty* and transferred to inactive duty. From the time of his sepa-

*Page reference followed by * refers to typewritten transcript prepared by appellant.

ration from active duty to the date of the hearings herein he held the commission of Lieutenant in the United States Naval Reserve. On December 29, 1955, the Chief of the Bureau of Naval Personnel directed a letter to the appellant, together with a narrative statement of facts and interrogatories pertaining to the plaintiff's conduct subsequent to the separation from active duty, which indicated that appellant's retention in the Naval Reserve was not clearly consistent with the interests of national security. Upon demand of the appellant a hearing before a local security board consisting of the appellees and appointed by appellee C. C. Hartman was set for January 17, 1956. Appellant then filed a complaint in which he sought temporary restraining order and temporary and permanent injunction against further administrative hearings by the appellees, and for a declaratory judgment and mandatory order that plaintiff not be deprived of his status as an *honorably separated* veteran of World War II.

On the same date that the appellant filed his complaint he sought a temporary restraining order which was denied and the court issued an order to show cause for a preliminary injunction returnable January 19, 1956.

On or about January 11, 1956, plaintiff mailed to appellee Commandant C. C. Hartman his conditional resignation from the Naval Reserve [Tr. 10].*

On January 17, 1956, a hearing of the local security board was held, at which plaintiff was represented by appointed military counsel as well as civilian counsel.

On January 18, 1956, all papers pertaining to this appellant together with recommendations of the board and the district Commandant were forwarded to the Chief of

Naval Personnel in Washington, D. C. as prescribed by SecNavInst. 5521.6.

On March 14, 1956, after having taken the matter under submission and considering the briefs filed, the court entered judgment dismissing complaint [Tr. 126].**

Summary of Argument.

1. The District Court should have ruled that the entire matter under consideration was moot. The administrative proceedings which appellant desired to enjoin had been completed prior to the hearing on the motion to dismiss so that there remained nothing to be done by the appellees herein. All administrative processes set forth in SecNavInst. 5521.6 were completed insofar as appellees were concerned, and all papers were forwarded to the Chief of Naval Personnel, Washington, D. C., on January 18 [Tr. 29].¹ As stated by appellant, on March 21, 1956, appellant was given notice by the Secretary of the Navy that he was discharged under conditions other than honorable. It is readily and clearly apparent that any order issuing out of the court in this jurisdiction will have no effect.

2. SecNavInst. 5521.6, under which the security board hearings complained of by appellant were held, and under which appellant was finally discharged as a security risk, is a valid exercise of the authority vested by statute in the Secretary of Defense to direct and control the ad-

**Page reference followed by ** refers to transcript of record as certified by clerk of District Court.

¹SecNavInst. 5521.6 Attached hereto as Appendix 1.

ministration of the three Armed Services by their respective Secretaries (Act of August 10, 1949, 63 Stat. 578, 580, 5 U. S. C. 171a(c)(4)) and to prescribe procedures for the discharge of persons in the Armed Forces.

SecNavInst. 5521.6 provides that a personal hearing will be offered to the individual concerned, that he will be furnished military counsel upon his request and may select such counsel if the individual selected is reasonably available. Further, that he may have civilian counsel if desired and that the board will assist him in procuring witnesses.

3. Appellant has sought to enjoin one of the steps in an administrative proceeding and seeks that remedy from a court of equity stating that he will suffer irreparable harm should relief prayed for not be granted. On the facts presented in this appeal the appellant has nothing but vague and uncertain fears which on the state of the present record were speculative. Events which took place subsequent to the ruling on appeal here are of no consequence in a determination of the issues presented. The court properly found that the plaintiff had no grounds for injunctive relief, that he had not shown that he had suffered irreparable harm and that there had been no final and conclusive proceeding which had been determined to his detriment.

4. Appellant sought an order from the court in the nature of mandamus to compel appellees to give to him an honorable discharge if any were to be given. District

Court properly did not consider that such had stated a cause of action and it is apparent that the court realized that it had no jurisdiction to compel the Secretary of the Navy to issue the appellant a different type of discharge from that which he might receive. The civil courts have recognized that, as a matter of both constitutional policy and legislative intent, the Navy constitutes a specialized community governed by separate law from that which governs civilians and have refused to review the exercise of discretion vested by Congress in the Secretary of the Navy as to the type of military discharge to be issued to a member of the Naval Reserve under particular circumstances.

The trial court was correct in its statement that the time was not yet ripe for equity intervention.

5. Again the trial court properly ruled that the plaintiff has not shown that he has suffered any irreparable harm and he is not in fact in jeopardy of losing valuable property rights. In his complaint plaintiff lists in detail various types of rights which he fears he will lose. These fears are without foundation and on the state of the record are not only erroneous but premature.

ARGUMENT.

I.

The Entire Matter on Appeal Is Moot and Thus There Is No Case or Controversy Upon Which Orders of This Court or the Lower Court Might Operate.

In order to determine whether the matter is moot it is necessary to look at the complaint.

The complaint seeks two fundamental orders:

- (a) Injunctive relief against proceedings under SecNavInst. 5521.6, and
- (b) A declaratory judgment that appellant not be deprived of his status as an *honorably separated* veteran of World War II.

It is necessary in analyzing the complaint to determine the status of appellees. Appellee C. C. Hartman is the Commandant of the 11th Naval District and as such is the convening authority referred to in SecNavInst. 5521.6 (12(c)). The remaining appellees are members of the local security board appointed by the convening authority. The functions of the security board are to conduct a hearing, following which they are to make recommendations. The convening authority also makes recommendations. These recommendations are then forwarded to the Chief of Naval Personnel for further review by Bureau Security Board (SecNavInst. 5521.6(12)(h))).

On January 17, 1956, the hearing before the local security board was held and on January 18, 1956, all papers and recommendations pertaining to the appellant were forwarded by the convening authority to the Chief

of Naval Personnel in Washington, D. C. On January 19, 1956 the hearing on the order to show cause and the motion to dismiss were heard by the District Court.

As was set forth in the affidavit of C. C. Hartman, one of the appellees herein [Tr. 102]:**

“Insofar as my command in the 11th Naval District is concerned, all administrative processes set forth in SecNavInst 5521.6 have been fully complied with in every particular. No further recommendations, opinions or hearings will be held in regard to Robert O. Bland within my command, unless new orders from the Chief of Naval Personnel or the Secretary of the Navy are received. All orders presently in this regard heretofore have been carried out.”

Assuming, *arguendo*, that this court should order the matter sent down to the District Court reversing the order and judgment of dismissal, what could the District Court do by way of order? Could it issue an injunction to the appellees not to conduct hearings under 5521.6? Could it order the appellees to proceed no further?

Under the facts the answers to the questions posed above are patent.

It has never been contended seriously by appellant that the appellees herein named have any power whatsoever to grant any type of discharge to the appellant. Any such discharge must come directly from the Secretary of the Navy or the President of the United States. Further, as it will be pointed out, no attempt has ever been made to divest the appellant of his status as an *honorably separated* veteran of World War II.

II.

SecNavInst 5521.6 Is a Valid Order and Covers a Matter Exclusively Under the Jurisdiction of the Secretary of the Navy.

The question of loyalty of a member of the Naval Reserve is exclusively under the jurisdiction of the Secretary of the Navy and the authority for the issuance of SecNavInst 5521.6 is twofold. First, 50 U. S. C. 992(a) allows dismissal of a reserve officer upon recommendation of a board of officers. The causes for such discharges are not enumerated, however, a discharge on security ground would certainly seem to properly fall under this general authority.

Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. A. 991 *et seq.*:

“DISCHARGE UNDER ARMED FORCES RESERVE ACT Part 6. Separation

Section 992—Limitation on discharges . . .

Officers with three years service

- (a) An officer of the reserve components who has completed three years of commission service shall not be involuntarily discharged or separated *except pursuant to the approved recommendation of a board of officers* convened by competent authority or the approved sentence of a court martial . . .

Character of discharge

- (c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) [not applicable] of this section shall be given a discharge under honorable conditions unless . . .

- (1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court martial *or the approved findings of a board of officers convened by a competent authority . . .*" (Emphasis added.)

The second authority for the security program, and SecNavInst 5521.6 in particular, is derived basically from general authority vested in the Secretary of Defense over the Secretary of the Navy in accordance with 5 U. S. C. 171(a)(c)(4). Pursuant to such authority the Secretary of Defense issued Department of Defense Directive 5210.9.²

III.

Until There Has Been Final Administrative Action the Court Review of the Administrative Proceedings Is Improper.

Should the court not dispose of this matter on the basis that the entire matter is moot it is a fundamental principle of law as stated in *Reinicke v. Loper*, 77 Fed. Supp. 333 (Hawaii, 1948):

"Where matters peculiarly within the purview of an administrative body are before it for disposition, a court of the United States will not (other than by way of restraining order) enjoin the administrative process. . . ."

A petitioner must first exhaust available administrative relief before invoking the extraordinary remedies of a court of equity. *Batista v. Nicolls*, 213 F. 2d 20 (C. A.

²Department of Defense Directive 5210.9 is attached hereto as Appendix 2.

Mass., 1954); *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336 (C. C. A. Cal., 1952).

Legislative intent that administrative remedies must be exhausted is spelled out in 5 U. S. C. A. 109(e) which section states that agency actions are reviewable by courts only where there has been a final agency action. Any preliminary procedural or intermediate agency action shall be subject to review upon the review of the final action.

The doctrine of exhaustion of administrative remedies requires not only the initiation of prescribed administrative procedures but it also requires that they be pursued to their appropriate conclusion and that final outcome be awaited before judicial intervention is sought. *Home Loan Bank Board v. Mallonee*, *supra*.

Administrative remedies must be exhausted before an injunction is sought in court even when it is argued that administrative regulations are unconstitutional. *Haymes v. Landon*, 115 Fed. Supp. 506 (D. C. Cal., 1953).

In the case of *Marshall v. Wyman*, 132 Fed. Supp. 169 (D. C. N. D. Cal., 1955), plaintiff sought a declaratory judgment of his rights to a certificate of honorable discharge from the Army. In that case the Army had conducted a hearing and had ordered plaintiff's undesirable discharge and plaintiff was discharged. Even in such a situation the court stated that plaintiff has not yet exhausted his administrative remedies. *A fortiori* it may be argued that where there has been no final decision of the administrative board and no discharge has been given

there has not been an exhaustion of administrative remedies.

Appellant relies heavily upon the holding in *Parker v. Lester*, 227 F. 2d 708. In the *Parker* case seamen were denied the right of employment by a summary finding by the Coast Guard Commandant following which they had a right to appeal to various boards. This action took from the plaintiffs the right to a livelihood. The court emphasized this in many points of the decision. They also stated that no adequate remedy of law existed, that damages to the plaintiff were irreparable and that Congress had made no provisions for review. In the present case there has been no final determination and plaintiff's case is subject to be reviewed *de novo* by a board in Washington, D. C. and should he ultimately receive an unfavorable discharge from the Naval Reserve he will not be deprived of his employment or any veterans benefits whatsoever.

In the *Parker* case the Coast Guard in California was actually keeping the plaintiffs off the ships, whereas in the present case there is no one within this court's jurisdiction taking any action relating to this appellant whatsoever, all administrative proceedings having been completed insofar as the appellant is concerned in this jurisdiction.

In the *Parker* case the court states that it has no right to review until there has been a final action and that until the administrative body has completed its

processes in the authorized manner they cannot be short circuited by an independent action for injunction. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Further, in the *Parker* case the courts stated that due process does not even require a hearing in the initial stages.

As will be seen by the reading of SecNavInst 5521.6, Section 12, it will be seen that the local board of which appellees were members was merely the first step in a chain of administrative proceedings. There is no basis for the conclusion drawn by appellant that the local security board could make only one type of recommendation. It is patent that the local security board might make one recommendation, the Commandant make another, Washington board still a different finding and finally another conclusion by the Chief of Naval Personnel or the Secretary of Navy. It is thus apparent that until there has been a determination adverse to the appellant, the appellant has suffered no harm and cannot be heard.

What appellant seeks is to prevent an initial stage of an administrative proceeding and further a mandamus, although not so-called by name, ordering the Department of the Navy to give to the appellant an honorable discharge. It seems almost too clear to require further analysis that the appellees named in this action have no authority to give the appellant any form of discharge, that duty being the sole responsibility of the Secretary of the Navy who is not a party to this action.

IV.

The Hearing of the Navy Board Is Not an Adjudication Which Is Within the Purview of the Administrative Procedures Act.

Where the selection or tenure of an officer or an employee of the United States is involved or in regard to the conduct of military naval or foreign affairs functions 5 U. S. C. A. 1004 of the Administrative Procedures Act does not apply.

V.

The Court Was Correct in Dismissing the Action for Lack of Jurisdiction.

The District Court correctly held that it lacked authority to compel the Secretary of the Navy to grant appellant a particular kind of discharge certificate.

It is established constitutional policy dating back to the early years of the Republic that the Judiciary will not interfere in the administration of military affairs. This policy is founded upon the constitutional separation of powers. The Constitution makes the President Commander in Chief of the Army and Navy (Art. II, Sec. 2); and "the Secretary of War is the regular constitutional organ of the President, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the Executive and as such be binding upon all within the sphere of his legal and constitutional authority." *United States v. Eliason*, 16 Pet. 291, 301.

As stated in *Orloff v. Willoughby*, 345 U. S. 83, 94:

“We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men but judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rest upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the Judiciary be scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”

The court stated earlier in *Reeves v. Ainsworth*, 219 U. S. 296, 306:

“ . . . The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and it may be, even its safety, through the efficiency of the Army. . . . If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.”

In *Gentila v. Pace*, 90 App. D. C. 75, 77, 193 F. 2d 924, the court held that Congress did not intend any judicial review of a military discharge even where it was alleged that the type of discharge given was not in accordance with law or army regulations.

See also *Goldstein v. Johnson*, 87 App. D. C. 159, 184 F. 2d 343, where the court held that the District Court had no jurisdiction of an action for declaratory judgment and mandatory injunction to set aside a dishonorable discharge allegedly given in contravention of the Articles of War. To the same effect are *Stock v. Department of the Air Force*, 186 F. 2d 968 (C. A. 4); and *Reid v. United States*, 161 Fed. 469 (S. D. N. Y.). In *Levin v. Gillespie*, 121 Fed. Supp. 726 (N. D. Cal.) the court issued an injunction against discharging a soldier with an undesirable discharge. On the authority of *Nelson v. Peckham*, 210 F. 2d 574 (C. A. 4). Congress promptly nullified the *Nelson* decision by the Act of June 18, 1954 (68 Stat. 254, 50 U. S. C. App. Supp. II 1952 ed.), and the District Court in the *Levin* case thereupon vacated the injunction. Furthermore, the District Court which decided the *Levin* case subsequently ruled that it had no authority to compel the Army to issue a particular type of discharge. *Marshall v. Wyman*, 132 Fed. Supp. 169 (N. D. Cal.). The principle that courts may not control the exercise of discretionary judgment is equally applicable to actions for declaratory judgment. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667, 671-672; *Colegrove v. Green*, 328 U. S. 549, 551-552; *Miguel v. McCarl*, 291 U. S. 442, 452; *Doehler Metal Furn. Co. v. Warren*, 76 App. D. C. 60, 129 F. 2d 43, 45.

Accordingly, the District Court's dismissal of the complaint for lack of jurisdiction should be affirmed.

VI.

No Constitutional Right of Appellant Has Been Infringed.

(a) *No right secured to appellant by First Amendment has been infringed.* The only conceivable clause of the First Amendment on which appellant can rely is "Congress shall make no law . . . abridging the freedom of speech . . ." How appellant's freedom of speech was abridged by conducting a hearing under SecNavInst. 5521.6 and making certain recommendations with regard to a possible discharge from the Naval Reserve as a security risk is difficult to see.

The guarantees of the First Amendment do not prohibit the Secretary of the Navy from taking measures to separate from the Navy persons who in his judgment may compromise the national security. See *Bailey v. Richardson*, 86 App. D. C. 265, 182 F. 2d 63. Appellant is as free to express his opinions and political views as before he was in the Naval Reserve. His eventual discharge, if anything, will increase his measure of personal freedom.

Appellant's argument apparently is that he was given consideration for discharge as "punishment" for his beliefs and associations during a period when he was in the inactive Naval Reserve. That argument quite misconceives the reason for the hearing of the local security board. The hearing was conducted because it was believed that he was a *security risk*. His actions during the period he was in inactive Naval Reserve status were merely evidence from which the Navy could draw conclusions that he was a security risk *in the Navy Reserve*.

The Navy's legitimate concern with morale and discipline is sufficient justification, if one were needed, for its

policy of not giving security risks the same award of honorable service given exemplary Navy men. In the words of the Secretary of Defense:

“I don’t believe you can give anyone a dishonorable discharge for something he did before he was in the services. The best you can do is just get him back out again on some kind of a basis that neither puts your stamp of approval on him or gives him a dishonorable discharge. I think it is sort of an intermediate position you have got to use. I don’t think that anyone that is released because he is a security risk or disloyal should be classified and given an honorable discharge the same as millions of fine men that have fought for our nation and have given loyal service.” (Hearing before the Senate Committee on Armed Services, 83rd Cong., 2d Sess. on S. 3096, Doctor Draft Act Amendment, p. 44.)

Even if it be thought, in some manner not known to us, that giving appellant an undesirable discharge limited his freedom of speech, it was a limitation permissible under the First Amendment. *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 721; *Adler v. Board of Education*, 342 U. S. 485; *United Public Workers v. Mitchell*, 330 U. S. 75; *American Communications Assoc. v. Douds*, 339 U. S. 382.

(b) *Appellant has not been denied any rights under the Fifth Amendment.* The Fifth Amendment provides that no one shall be “deprived of life, liberty or property without due process of law.” Obviously a discharge less than honorable would not deprive the appellant of either his life or liberty. *Bailey v. Richardson*, 86 App. D. C. at 259, 182 F. 2d 57, so the question is whether it deprived him of “property.”

A less than honorable discharge from active duty does render the appellant ineligible for such veterans' benefits as mustering out pay, payment for accrued leave, preferences in Federal employment and homestead preferences, but these veterans' benefits, ". . . are gratuities. They involve no agreement of parties; and the grant of them creates no vested right." *Lynch v. United States*, 292 U. S. 571, 577; *Slocum v. Gray*, 86 App. D. C. 5, 8, 179 F. 2d 31, 34. Consequently appellant has not been deprived of any "property," whether by due process or not.

Further, appellant was not discharged from active duty and although he contends that he will lose valuable rights by being deprived of his status as an honorably separated veteran of World War II, this statement is misleading and false. At the time that appellant was placed on inactive duty his rights as an *honorably separated* veteran of World War II became fixed as to all of the sections cited by appellant as benefits which have accrued to him as the result of his service with the Navy from 1942 to 1946 [Tr. 6].* Such benefits therein became fixed at the time he was released from active duty under the specific provisions cited by appellant.

Federal real estate loan benefits accrued to "any person who shall have served in the active military or naval service of the United States at any time on or *after September 16, 1940*, and prior to the termination of the present war and who shall have been discharged or *released therefrom* under conditions *other than dishonorable*." (Emphasis added.) 38 U. S. C. A. 694.

Hospital, medical and burial benefits under Veterans Regulations 6(a) (38 U. S. C. A. (C. 12)) may be provided to "veterans of any war . . . not *dishonorably discharged*." (Emphasis added.)

Special taxation and loan benefits in the State of California accrue to certain categories of veterans under Article XII, Section 1¼ of the California Constitution and Section 800 Military and Veterans Code of California. The wording in both instances is substantially the same: that such benefits accrue to a wartime veteran who “received an honorable discharge . . . or who has been *released from active duty . . . under honorable conditions.*” (Emphasis supplied.)

Preferential employment status is granted to veterans by the United States and the State of California. Those entitled to Federal preferences are “those . . . who have served on *active duty* in any branch of the Armed Forces of the United States *during any war . . . and have been separated* therefrom under honorable conditions.” (Emphasis supplied.) 5 U. S. C. A. 851. California gives preference to veterans with the following qualifications:

“. . . The veteran must have been *released from* the service under conditions *other than dishonorable.*” (Emphasis supplied.)

Selective Training and Service Act of 1940. (Govt. Code, Secs. 18540, 18540.1, 18540.2, 18540.3, 18540.4, 18541, 18971, 18973 and 18974.)

Finally, considering the multitude of factors which may be properly taken into account in considering whether one in the military service is a security risk, the various acts and associations set forth in Defense Directive 5210.9 are as specific as could be reasonably be expected. No more precious and definite listing of relevant factors is possible or even necessary, hence, even if the constitutional doctrine of vagueness has any application to this

type of administrative instruction the requirements of that doctrine would be met. *Lichter v. United States*, 334 U. S. 742; *American Power Co. v. S. E. C.*, 329 U. S. 90, 104; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Opp. Cotton Mills v. Administrator*, 312 U. S. 126; *Yakus v. United States*, 321 U. S. 414, 423-424; *United States v. Rock Royal Co-op*, 307 U. S. 533, 574; *Hampton & Co. v. United States*, 276 U. S. 393.

Accordingly the threat of a hearing and possible discharge other than honorable did not violate any of appellant's constitutional rights.

Conclusion.

The judgment below should be affirmed on the ground that issues presented herein are moot; that the District Court lack authority to compel the Secretary of the Navy to issue any particular kind of discharge; and that until all administrative processes were complete the matter was not ripe for equity intervention.

Respectfully submitted,

LAUGHLIN E. WATERS,
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MAX F. DEUTZ,
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APPENDIX 1.

DEPARTMENT OF THE NAVY
Office of the Secretary
Washington 25, D. C.

SECNAV 5521.6

Pers-18-sem

23 June 1954

SECNAV INSTRUCTION 5521.6

From: Secretary of the Navy

To: All Ships and Stations

Subj: Navy and Marine Corps Military Personnel Security Program

I. GENERAL

1. *Purpose.* The purpose of this Instruction is to revise and restate naval security policies and procedures with reference to acceptance, separation, retention, and assignment of Navy and Marine Corps personnel where credible information indicates their acceptance or retention may not be clearly consistent with the interests of national security.

2. *Cancellation.* SECNAV letter P1-6 dated 10 January 1949 (NDB Jan-Jun 1949, 49-15, p. 6), BUPERS Circular Letter 4-49 (NDB Jan-Jun 1949, 49-27, p. 109), and MARCORPS General Order 101 are hereby cancelled and superseded.

3. *Scope.* This Instruction is applicable to all personnel of the Navy and of the Marine Corps (including the Coast Guard when the Coast Guard is operating under the Department of the Navy), including Reserve components of both, officer and enlisted, active, retired, and inactive, and to all persons applying for appointment or

enlistment in, or in process of induction into, any component of the Navy or of the Marine Corps. The responsibility for implementation of this program is vested for members of the Navy, in the Chief of Naval Personnel, and, for members of the Marine Corps, in the Commandant of the Marine Corps.

4. *Pending Cases.* Cases already processed to the point of delivery to the individual of narrative statement and interrogatories, as of the effective date of this Instruction may be completed in accordance with previously existing instructions. Action on all other cases will be initiated or continued in accordance herewith.

5. *Policy and Standard.* The Department of the Navy holds that the standard for appointment, enlistment, or retention of any individual into, or in, any component of the Navy or of the Marine Corps shall be that his prospective or continued utilization in the naval service is clearly consistent with the interests of national security. As used herein, the term "national security" relates, inter alia, to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the Government in domestic and foreign affairs against or from espionage, sabotage, and subversion, and any and all acts designed to weaken or destroy the United States.

6. *Criteria for Application of Standard.* In making determinations of consistency of service with the interests of national security, account shall be taken of the sensitivity of positions held and of those which the individual concerned might reasonably be expected to hold in the service throughout his continuation therein. In this connection, an officer or warrant officer of any component of

the Navy or Marine Corps holds a sensitive position by virtue of his commission or warrant, regardless of the duties and responsibilities of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or material will be considered to hold a sensitive position regardless of the duties and responsibilities of his assignment.

7. *Classes of Activities, Associations, and Attributes To Be Considered in Applying Criteria.* The ultimate determination of whether acceptance into, or rejection from, service in the Navy or Marine Corps is clearly consistent with the interests of national security must be based upon an overall common sense evaluation of all available information concerning an individual. The activities, associations, and attributes listed below, whether current or past, and while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination with regard to the hazard to national security actually presented.

a. *Activities, Associations, and Attributes of Primary Security Significance.* Activities, associations, and attributes of primary security significance include, but are not limited to, the following:

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent

or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by the Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of Government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established. However, it should also be noted that there are many organizations of a highly suspect character which have not been officially designated as subversive, and the nonappearance of a given organization on the Attorney General's list does not necessarily mean that the organization may not be subversive.)

(5) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of article 31, Uniform Code of Military Justice, in refusing to completely answer questions contained in DD Forms 98, 390, or 398; pleading protection of the Fifth Amendment or of article 31, Uniform Code of Military Justice, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in (1) through (5) above, and (7) through (13) below.

(7) Participation in the activities of an organization as a front for an organization referred to in (4) above, when his personal views were sympathetic to the subversive purposes of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of an organization referred to in (4) above.

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in (1) through (8) above. A close continuing association may be considered to exist if the individual lives in the same residence as, frequently visits, or frequently communicates with, such person.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in subparagraph b below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

b. *Activities, Associations, and Attributes Primarily Indicative of Military Unfitness.* There follows an outline of certain, but not all-inclusive, classes of activities, associations, and attributes, which, if present independently of any matters of the type outlined in subparagraph a above, should be considered in the first instance for disposition in accordance with other regulations and instructions. In cases wherein any of the following exist in combination with one or more of the matters set forth in subparagraph a above, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, will determine whether, in the first instance, action shall

be initiated under this, or other, regulations and instructions. These activities, associations, and attributes are:

(1) Willful violation or disregard of security regulations.

(2) Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

(3) Any deliberate misrepresentation, falsification, or omission of material fact.

(4) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(5) All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

c. *Fraud.* Concealment of, misrepresentation with regard to, or failure fully to disclose, present or previous conduct or associations of the character set forth above, in making application for enlistment or appointment in any component of the naval service, is hereby denominated fraudulent, and action shall be taken in the naval service, or the facts made known to appropriate civil authority, as the law may provide in such cases.

8. *Investigative Responsibility.* The Director of Naval Intelligence is responsible for providing investigative coverage of the matters referred to in subparagraph 7a, subsections (1) through (13), in cases involving members or prospective members of any component of the Navy or Marine Corps. The Director of Naval Intelligence will also provide investigative assistance in the categories enumerated in paragraph 7b, when so requested. Con-

fidential informants and investigative techniques available to and utilized by Naval Intelligence will not be disclosed to the boards. However, Naval Intelligence will, whenever practicable, provide such information relating to the reliability of its sources as may be of assistance to the boards in arriving at a determination.

9. *Reporting of Information.* It shall be the duty of every member of the Navy and of the Marine Corps, regardless of status or component, to report to his commanding officer any information coming to his attention which indicates a probability of any activity, association, or attribute of the character outlined in paragraph 7 above on the part of any member of the Armed Forces, or which otherwise indicates that retention of such member may not be clearly consistent with the interests of national security. Commanding officers to whom such a report is made shall advise a representative of Naval Intelligence thereof at the first opportunity in the event the report encompasses any of the matters set forth in subparagraph 7a. When representatives of Naval Intelligence are not available without unreasonable delay or inconvenience, such reports shall be made directly to the Director of Naval Intelligence, Department of the Navy, Washington 25, D. C., via such direct media as best assure minimal publication of such information. No action should be taken, prior to consultation with a representative of Naval Intelligence, which might apprise any individual that he is under suspicion, regarding matters covered by subparagraph 7a, unless security of the command or the national interests render such action imperative.

II. SECURITY BOARDS

10. *General.* For the consideration and disposition of cases arising under this Instruction, security boards shall be established and variously utilized as herein directed or as circumstances may require. All officers of the Navy and Marine Corps, and components thereof, on active duty, except those serving on duty with Naval Intelligence, shall be eligible for membership on such boards. In addition, civilian officers (appointed by the President with the advice and consent of the Senate) of the Office of the Secretary of the Navy shall be eligible for membership on the departmental security boards, hereinafter described. In each case involving a possibility of recommendation by a security board for discharge or involuntary release from active duty, of a member of a Reserve component, the membership of such board shall include a majority of members of the same component and all members shall be senior to the member concerned.

a. *Local Security Boards.* These boards may be convened by commands authorized to convene general courts-martial when requested to do so by the Secretary of the Navy, the Chief of Naval Personnel, or the Commandant of the Marine Corps, as appropriate, and all such commands are hereby designated competent authority to convene boards of officers for these purposes. Such local security boards shall be composed of three or more officers subject to the jurisdiction of the convening authority. However constituted, such boards shall be directed to the end of obtaining factual findings and unbiased opinions by the members thereof that the individuals whose cases are under consideration are or are not persons whose continued services are clearly consistent with the interests

of national security. When separation of an individual is recommended, these boards shall render an opinion as to the type of discharge deemed appropriate.

b. *Bureau and Headquarters Security and Screening Boards.* These boards shall be convened by the Chief of Naval Personnel or the Commandant of the Marine Corps, as required, who are hereby designated as competent authority to convene boards of officers for these and other purposes. Such Bureau and Headquarters security boards shall be composed of three or more officers serving in the Bureau of Naval Personnel or in Headquarters, U. S. Marine Corps, or in bureaus or offices of the Department of the Navy. However constituted, these boards will variously function as initial, intermediate, or final administrative processing bodies, and as intermediate and final review bodies in consideration of cases arising under this Instruction. Actions which may be recommended by these boards shall include, but not be limited to, the following:

(1) Referral of cases to the Secretary of the Navy for consideration by a departmental security board; referral of cases to commands authorized to convene general courts-martial, or to commanding officers, for action under UCMJ or by local security boards.

(2) Acceptance, rejection, retention, promotion, termination of temporary appointment, separation from active duty, retirement, separation, granting and denial and revocation of security clearances, restriction and removal of restriction on duty assignments, characterization of separation, and other administrative action authorized by law with respect to members or prospective members of

the Navy or the Marine Corps, including components thereof, whose cases may be under consideration.

(3) Temporary assignment of individual members of the Navy or the Marine Corps to specially controlled duty pending further investigation or development of additional information. Indefinite assignment to such duty will be made only as prescribed by the Secretary of the Navy.

c. *Department of the Navy Security Boards.* These boards shall be convened by the Secretary of the Navy and shall be composed of three or more officers of the naval service. A civilian officer (appointed by the President with the advice and consent of the Senate) of the Office of the Secretary of the Navy may be appointed a member. However constituted, these boards may perform any of the functions of a local security board and/or a Bureau or Headquarters board and shall possess all of the powers and authority incident thereto. In addition, these boards may function as final review bodies with respect to cases which have been processed through Bureau or Headquarters security boards.

Referral of cases to these boards should be held to a minimum in instances other than those presenting substantial differences of opinion between or among members of other boards and/or convening and any reviewing authorities.

III. ADMINISTRATIVE AND BOARD PROCEDURES

11. *Initial Action.* Processing of a case coming under the purview of this Instruction will follow the administrative and board procedures outlined below:

a. On receipt of credible information reflecting doubt on the acceptance of persons for, or the continuation of

members in, the naval service from the viewpoint of interest of national security, the Chief of Naval Personnel or the Commandant of the Marine Corps may take such action as appears appropriate and/or such information may be presented to a Bureau or Headquarters security board.

(1) On the basis of a review of all pertinent information in such case the board will recommend appropriate action to the Chief of Naval Personnel or the Commandant of the Marine Corps. Such recommendations may include, but are not limited to, the following:

(a) That further investigation be undertaken; or

(b) That sufficient credible evidence having probative value is available and usable to warrant that court-martial proceedings be initiated; or

(c) That administrative action looking toward possible separation of the member be undertaken; or

(d) That an applicant be rejected; or

(e) That the case be closed, without prejudice to the individual, on the grounds that further processing under this Instruction appears unwarranted; or

(f) That the case be referred to the Judge Advocate General for consideration of referral thereof to appropriate Federal or State civil authority; or

(g) That specified other administrative action be undertaken.

(2) In each case in which a Bureau or Headquarters security board recommends that administrative action looking toward possible separation of the member be undertaken, said board shall render an opinion as to the

character and type of resignation (officer) or agreement to accept discharge (enlisted) to be offered to the member concerned in lieu of undergoing administrative processing.

(3) After consideration of the board's recommendations, by the Chief of Naval Personnel or the Commandant of the Marine Corps, such actions may be taken as he may deem appropriate, which may include, but are not limited to, the following:

(a) The member may be assigned to specially controlled duty pending completion of investigation or other administrative action.

(b) The member may be assigned or reassigned to normal duties with concomitant eligibility for such clearance by his commanding officer as may be required therefor.

(c) The case may be referred to the Secretary of the Navy for his consideration and concurrence or nonconcurrence with the approved recommendation.

(d) The appropriate command may be directed to initiate action with a view toward trial by courts-martial.

(e) The appropriate authority may be directed or requested to initiate administrative action as hereinafter described looking toward separation of the member.

(f) The applicant may be accepted or rejected as appropriate.

(g) Other administrative action be initiated.

12. *Hearing Procedures*

a. Should administrative action toward possible separation of an individual be recommended and approved,

the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, will request from the Director of Naval Intelligence, an unclassified narrative statement of fact as disclosed by investigation, together with unclassified written interrogatories drafted with a view toward giving the individual an opportunity to present, in a logically coherent manner, the matter within his knowledge corroborating, explaining, or tending to refute, assertions made or inferences arising from allegations made in the narrative statement of fact. The Director of Naval Intelligence shall not furnish such narrative statement of fact and interrogatories, however, unless and until he is satisfied that administrative processing of the individual concerned will not materially impede or compromise any impending prosecutions or investigations by any Federal agency. The Director of Naval Intelligence will cause to be forwarded to the appropriate district intelligence officer the individual's investigative case file or copies thereof. Such district intelligence officer shall make this case file available to the local security board, together with instructions governing its use and disclosure of its contents. Each member of the local security board shall study the file prior to the hearing of the case.

b. Upon receipt of the narrative statement of facts together with suitable interrogatories, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, shall transmit such narrative statement of fact and interrogatories to an appropriate general court-martial convening authority, or to the individual concerned via the chain of command in case the local security board is convened at Bureau or Headquarters level. Such narratives and interrogatories are considered to be per-

sonal in nature and full consideration should be given to protecting the rights of the individual by privacy in administrative handling.

c. Such general court-martial convening authority, or the Chief of Naval Personnel, or the Commandant of the Marine Corps, as appropriate, shall transmit the narrative statement of facts and interrogatories to the individual concerned, and shall appoint a local security board. The letter of transmittal shall conform in substance to appendix 1 and in each case a personal hearing will be offered. The respondent will be furnished military counsel upon his request and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The board will assist him in procuring witnesses who are reasonably available but he will not be entitled to reimbursement for expenses incurred incident to their appearance.

d. Officers of the naval service who desire to resign, or enlisted men who agree to accept discharge, after receipt of a narrative statement and interrogatories, in lieu of undergoing subsequent stages of administrative processing under this Instruction may forward a tender of resignation to the Secretary of the Navy or agreement to accept discharge to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate. The tender of resignation or agreement to accept discharge will be in one of three forms: honorable, under honorable conditions, or under other than honorable conditions. Decision as to the form of tender or agreement to be offered to the respondent shall be made by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, based on a careful evaluation of the nature

and extent of all the credible information available. When the narrative statement and interrogatories are transmitted to the member concerned he shall also be furnished a sample (enclosure (4) to appendix 1) of the form of tender or agreement, which, in the absence of later pertinent information, will be acceptable to the Department. In the event the member is informed hereunder that only a tender of a resignation or agreement to accept discharge under honorable conditions with a general discharge certificate or under other than honorable conditions is acceptable, he will be further advised that departmental authority has discretionary power to effect or direct separation in higher form, notwithstanding the form of submission, and that he may forward with such tender or agreement, a written statement in his own behalf, setting forth any matter which he desires to present for consideration by departmental authority.

e. If a response to the letter transmitting the narrative statement and interrogatory is received, accompanied by, or in the form of a resignation or agreement to accept discharge (substantially in the form of the sample offered) the command will forward the resignation or agreement and withhold further action pending Bureau or Headquarters instructions.

f. In any of the following cases, the command shall address a notice of hearing to the individual, conforming in substance to appendix 2. The board shall convene at the time and place stated in the notice, and shall conduct a personal hearing in accordance with the provisions of appendix 3, whether or not the individual has acknowledged notice of the hearing. In addition, specific procedures are outlined for each situation as follows:

(1) Upon lapse of the time allotted without receipt of any response from the individual concerned the local security board shall be so notified and thereafter convene and, on the basis of such information as is available, make findings, opinions, and recommendations regarding retention or separation of the individual and the type and character of separation if recommended.

(2) If a response to the letter transmitting the narrative statement and interrogatory is received with no request for a personal hearing, the local security board shall be so notified and thereafter convene and, on the basis of such information as is available, including the response above mentioned and any material presented at the hearing, make findings, opinions, and recommendations as above.

(3) If a response to the letter transmitting the narrative statement and interrogatory is received, with a request for a hearing, such request shall be granted.

g. The transmitting command is authorized to grant reasonable extensions of time to individuals in answering the narrative statement and interrogatories, or in appearing before the local security board. Department of Defense policy, however, limits the time which may be afforded the individual to present his cause to 15 days, and permits a period in excess thereof to be granted "only in case of a showing of vital need." This normal limit of 15 days is considered to include time allotted for both preparation of written response to narrative statements and interrogatories and preparation of any written and/or verbal presentation to be made by or on behalf of the individual concerned before any board. "Vital need" is deemed to preclude any extension to meet

the convenience of the individual concerned or counsel representing him. "Vital need" will include inability of the individual to attend a hearing by reason of serious illness, attested by certificate of a reputable attending medical practitioner, or desire to procure evidence or testimony, if it appears from an affidavit by the individual that such evidence would be uniquely material and could not be satisfactorily supplied by stipulation.

h. The convening authority shall review the record of the local security board, and may, to any extent deemed necessary, return the case to the board for revision, clarification, amplification, explanation, or reconsideration of its findings, opinions, or recommendations, or any aspect thereof. The convening authority may not, however, direct the board or any member thereof to return any revised finding, opinion, or recommendation which would be inconsistent with the clear intent of one which they or he have or has expressed. The record, together with the action and comment of the convening authority thereon shall be transmitted to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, for further review by a Bureau or Headquarters security board.

i. After review, a Bureau or Headquarters security board shall make findings and render an opinion as to whether the retention in the service of the individual concerned is clearly consistent with the interests of national security. If such retention in the opinion of the board, be not clearly consistent with the interests of national security, the board shall recommend separation and shall render an opinion as to the type and character of such separation.

j. The Chief of Naval Personnel or the Commandant of the Marine Corps shall thereupon review the entire record, including the investigative file concerning the individual, and shall take or initiate action which may include, but not be limited to, the following:

(1) Initiate action to cause the individual to be separated from the service with an appropriate discharge in conformity with then existing law and regulations; or

(2) Cause the individual to be retained in the service with concomitant eligibility for such clearance by his commanding officer as may be required; or

(3) Forward the record, together with any comments or opinions or recommendations to the Secretary of the Navy for consideration of referral to the departmental security board.

k. The Secretary of the Navy, in cases which are referred to him, will, with or without referral to the departmental security board:

(1) Return the record to the Chief of Naval Personnel or to the Commandant of the Marine Corps, as appropriate, for final determination; or

(2) Direct the separation of the individual from the service with an appropriate discharge in conformity with then existing law and regulations; or

(3) Direct the retention of the individual in the service with concomitant eligibility for such clearance by his commanding officer as may be required.

13. *Effect of Final Decision.* Upon completion of review of cases arising under this Instruction, the decision of the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, or by the Secretary

of the Navy, shall be conclusive and binding throughout the naval service, in the absence of subsequently developed information substantially controverting the earlier finding.

a. The command having jurisdiction of the individual, or direct concern in the matter at issue, shall be notified of the final decision.

b. A copy of the entire record of each case shall be furnished the Director of Naval Intelligence for inclusion in the investigative case file pertinent thereto.

IV. REJECTION FOR ACTIVE NAVAL SERVICE

14. *Procedure With Regard to Applicants.* Each applicant for enlistment into any component of the Navy or Marine Corps shall be required to accomplish a DD Form 98 (Loyalty Certificate for Members of the Armed Forces) prior to his acceptance. Each applicant for appointment into any component of the Navy or Marine Corps shall be required to accomplish DD Forms 98 and 398, and 390 where required, prior to appointment. If any applicant fails or refuses to accomplish the forms in their entirety, or if any entry is made in the body of DD Form 98 other than "None" or "None to my knowledge," further action toward effecting the enlistment or appointment shall be discontinued, and all papers shall be transmitted direct to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, with a letter report outlining in detail the circumstances surrounding the incident. Enlistment or appointment of the person concerned shall not thereafter be effected without the approval of the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate. In cases of rejection under this paragraph, report thereof shall be made to the Director of Naval Intelligence.

15. *Procedure With Regard to Reservists, Fleet Reservists, Fleet Marine Corps Reservists, and Inactive Retired Personnel Ordered Into the Active Naval Service.* Orders to each member of a Reserve component of the Navy or of the Marine Corps, fleet reservist, fleet Marine Corps reservist, and retired member voluntarily or involuntarily ordering him to extended active naval service shall, in the absence of determination to the contrary by the Chief of Naval Personnel or by the Commandant of the Marine Corps, as appropriate, contain a direction for the accomplishment of a DD Form 98 on reporting to the initial activity to which his orders require him to report for such duty.

a. Upon satisfactory accomplishment of DD Form 98, the activity at which it has been thus accomplished will include in its endorsement upon the individual's orders a statement to that effect, transmitting the executed DD Form 98 to the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate.

b. In the event of failure, or refusal, of an individual to complete a DD Form 98, or if he makes entries thereon which provide any basis for question as to the consistency of his retention on active duty with the interests of national security:

(1) Report thereof will be made to the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate.

(2) His orders will be endorsed to indicate such failure, refusal, or questionable entries made.

(3) His orders will further be endorsed to the effect that the unexecuted portion of his orders are suspended

and he will remain in an active-duty status at that activity pending any cancellation or modification of his orders by the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate.

c. Upon receipt of a report that an individual is being thus retained awaiting further instructions, the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate, will cause an immediate investigation of the individual to be made and may make such interim reassignments of the individual concerned as may be required to facilitate investigation, administrative convenience, or both.

(1) If the result of this investigation reveals prima-facie evidence that the individual has committed an offense, punishable by court-martial, while subject to the Uniform Code of Military Justice, and if the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, consider that the interests of the naval service and the national security would be best served by such action, the individual will be retained on active duty, and the proper command will be directed to institute proceedings under the Uniform Code of Military Justice.

(2) If after investigation, it is determined that action under the Uniform Code of Military Justice should not be taken, but there is probably cause for belief that his retention on active duty would not be clearly consistent with the interests of national security, he will be promptly released from active duty, and when appropriate, administrative proceedings prescribed in this directive will be instituted.

(3) If the investigation reveals that the failure or refusal to complete the DD Form 98 or the making of

any statement thereon, which would be the basis for question in the light of national security, was done or falsified with intent of avoiding active duty, the individual may be retained on active duty and placed under any restrictions with respect to assignments and access to classified information that may be required to protect the interests of national security. It should be kept in mind that such intentional acts of the individual to deceive are subject to disciplinary action under the Uniform Code of Military Justice.

16. *Opportunity for Reservists Not on Active Duty To Make Advance Disclosure.* Any reservist not on active duty who, in the event that he were subsequently ordered to active duty, (a) would fail or refuse to accomplish the DD Form 98, or (b) would make entries thereon which might be indicative of inconsistency with the interests of national security of his retention on active duty, may address a letter to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, making full disclosure of the facts and circumstance involved. The making of such a disclosure by a reservist shall not affect the authority of the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to order the reservist concerned to active duty, nor his obligation to comply fully and promptly with any orders which may be issued to him. However, such information will be forwarded to the Director of Naval Intelligence for proper investigative development. Upon completion of such investigation, the Director of Naval Intelligence will make report to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, who will take action in accordance with this directive.

17. *Procedure With Respect to Inducted Persons.*

a. No person who is known or reasonably suspected, by any member of any component of the Navy or Marine Corps present at the time, to be a Communist will be inducted into the armed services by or with the assistance of such member, and each such member will promptly advise a responsible authority of the inducting activity of such information as he may have indicating that any person about to be inducted may be a Communist. No person who has been inducted and who is known or reasonably suspected to be a Communist shall be accepted for service in any component of the Navy or of the Marine Corps, except as indicated in b. below.

b. In each induction station which is now or may hereafter be in charge of or commanded by any member of any component of the Navy or the Marine Corps, each prospective inductee will be requested to execute a DD Form 98 prior to his induction. Any such person who fails or refuses to accomplish such form in its entirety, or who makes entries upon such form disclosing significant derogatory information with respect to his background, will be nonetheless inducted, and all persons inducted under the foregoing circumstances will be distributed between the Navy and the Marine Corps in assignments for service in substantially the same relative proportions as other inducted persons are at the time being assigned to those respective services. Inducted persons who are thus assigned to the Navy, the Marine Corps, or both, will be retained on nonsensitive assignments in the lowest pay grade permitted by law, pending completion of a thorough investigation. In event this investigation reveals that further retention would be inconsistent with the interests of national security.

(1) If the inducted person has failed or refused fully and faithfully to execute the DD Form 98 in its entirety, or has failed or refused to answer any question addressed him in the course of investigation pertaining to matters related to any of the questions asked in that form, he shall be separated under other than honorable conditions;

(2) If the inducted person has fully and truthfully executed the DD Form 98 in its entirety and has fully cooperated in the investigation of his case, he shall be separated, and the character of the separation shall be predicated upon the service performed.

c. Should the investigation disclose insufficient derogatory information to warrant separation in the interest of national security, the inducted persons concerned will be continued in the service. Those who refused to accomplish satisfactorily the DD Form 98 in its entirety will be continued on nonsensitive assignments; all others will be appropriately assigned. In each case, upon termination of the obligated tour of duty, the character of separation shall be predicated upon the service performed.

d. Officers of any component of the Navy or the Marine Corps, who are in charge of or command induction stations, will not induct or authorize the induction of any person as to whom they are advised by the Chief of Naval Personnel or the Commandant of the Marine Corps that investigation has substantiated sufficient derogatory information clearly to support a determination that the service of such person in any capacity would be inconsistent with the interest of national security.

18. *Special Procedures for Certain Civilian Doctors and Dentists Who Are Subject to Induction.* Doctors and

dentists who are subject to induction and who apply for and are denied commissions for security reasons, except for those who in connection with their application for a commission refuse to accomplish DD Form 98 in its entirety or plead protection of the Fifth Amendment in refusing to answer completely questions contained in DD Forms 98, 390, 398, or other related forms, will be given an opportunity to be heard before an appropriate board of officers (hearing board) prior to induction.

a. The responsibilities and functions of the Chief of Naval Personnel and the Director of Naval Intelligence as prescribed in this Instruction with regard to members of the Navy shall be likewise applicable to doctors and dentists within the purview of this paragraph, regardless of lack of service membership or status, except as hereinafter provided.

b. Prior to referral to a hearing board, the Chief of Naval Personnel shall cause to be reviewed, by a screening board appointed by the Secretary of the Navy, any information bearing upon the consistency with interest of national security of prospective employment upon active duty of a doctor or dentist within the purview of this paragraph. Such board shall make appropriate recommendations to the Secretary of the Navy via the Chief of Naval Personnel, which will include among other things, (a) whether the applicant should be tendered a commission, or (b) whether the case should be referred to a hearing board, and (c), if a hearing is recommended, the information to be included in the unclassified Narrative Statement of Fact (letter of allegations).

c. The Director of Naval Intelligence shall, upon being advised of the recommendations of the screening board

and Secretarial approval, prepare and transmit to the Chief of Naval Personnel a Narrative Statement of Fact and Interrogatories including the information recommended by the board, subject to the same provisions set forth in paragraph 12a, above, with reference to members of the service.

d. Prehearing and hearing procedures prescribed in paragraph 12 of this Instruction and in the appendixes shall be utilized, insofar as practicable, with appropriate modifications in forms, transmittals, notices, etc., to reflect the absence of service status on the part of the individuals under consideration.

e. In lieu of recommendations made with respect to members of the service, hearing boards considering cases of doctors and dentists within the purview of this paragraph will recommend, in the alternative, that the individual concerned be: (a) tendered a commission, (b) denied a commission, or (c) rejected for service in any capacity on the basis that such service would be inconsistent with the interests of national security.

f. The provisions of this paragraph are applicable to registrants having an obligation for service under subsection 4(i) only of the Universal Military Training and Service Act, as amended, as well as those having an obligation for service under subsections 4 (a) (b) and (i) of the aforementioned act.

19. *Subsequent Appointment or Enlistment of Persons Separated Hereunder.* No person who has been separated from any component of the Navy or of the Marine Corps under the provisions of this Instruction, and no person from any component of the Navy or of the Marine Corps under any other authority to avoid investigation

and/or board procedures under this Instruction, shall be subsequently appointed or enlisted in any component of the Navy or of the Marine Corps without specific prior approval thereof by the Secretary of the Navy. No person separated from any other armed service under the provisions of a directive of the service concerned corresponding to this Instruction, or who is reported by that service to have been separated therefrom under other authority while undergoing investigation under the provisions of such directive, will be appointed or enlisted in any component of the Navy or of the Marine Corps.

V. GENERAL ADMINISTRATIVE POLICIES

20. *Separation Processing—Form DD 214.* In each case wherein a member of any component of the Navy or of the Marine Corps is separated from an active-duty status pursuant to a determination that his continued service is not clearly consistent with the interests of national security, the DD Form 214 (Report of Separation) will cite this Instruction as authority.

21. *Delayed Compliance in Exceptional Situations.* In any case wherein there is reason to believe that departure or deviation from or temporary noncompliance with any provision of this Instruction is required in the interests of avoiding premature warning of suspects in a pending investigation, of avoiding compromise of confidential sources of information, or of facilitating in any way an important pending or contemplated investigation or prosecution, compliance herewith shall be delayed until such considerations no longer militate against action hereunder. All naval and Marine Corps commands are enjoined to comply fully with requests by the Director of Naval Intelligence (made either on behalf of his office or at the

behest of any other Federal investigative agency or agencies) for cooperation in respects such as those indicated, as well as for any other assistance in conducting any investigation pertaining to the national security.

22. *Notification of Federal Agencies.* The Director of the Federal Bureau of Investigation will be notified by the Director of Naval Intelligence of the names, last known address, and other pertinent information concerning persons denied enlistment or appointment, rejected from induction, or separated from the naval service in compliance with this Instruction. Similarly, the Civil Service Commission and Selective Service System will be notified by the Chief of Naval Personnel or the Commandant of the Marine Corps of persons so rejected from inductions.

23. *Security Clearances for Individuals Participating in the Administration of This Instruction.* Notwithstanding any other provisions or regulations, manuals, or instructions, a final Top Secret clearance is required, with the further requirement that, if clearance is not based on a satisfactory background investigation, such investigation has been duly initiated, for members of all boards appointed pursuant to this Instruction; security clearances required for other individuals participating in any phase of administration of this Instruction shall be commensurate with the classification assigned matter, material, or information being handled in each particular instance or case.

ALBERT PRATT

Assistant Secretary of the Navy
(Personnel and Reserve Forces)

APPENDIX 2.

7 April 1954

NUMBER 5210.9

(Seal)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Military Personnel Security Program

References:

- (a) Joint Agreement of the Secretaries of the Armed Forces, Subject: Disposition of Commissioned and Enlisted Personnel of the Armed Forces of Doubtful Loyalty, dated 26 October 1948.*
- (b) Office of the Secretary of Defense Memorandum to Department Secretaries, Subject: Policy with Respect to Loyalty Examination of Inducted Persons and Disposition of Inducted Persons Determined to be or Suspected of Being Disloyal, dated 15 November 1949.*
- (c) Office of the Secretary of Defense Memorandum to Department Secretaries, Subject: Policy Concerning Military Personnel who are Considered Security Risks (M-11B-50), 19 February 1951.*
- (d) Presidential Executive Order 10450, Subject: Security Requirements for Government Employment, dated 27 April 1953.
- (e) Presidential Executive Order 10491, Subject: Amendment of Executive Order No. 10450 of April 27, 1953, Relating to Security Requirements for Government Employment, dated 13 October 1953.

*Will be cancelled by this directive.

I. PURPOSE AND SCOPE

A. *Purpose*

1. The purpose of this directive is to effect reissue with certain modifications of the various Armed Services directives to apply to military personnel the criteria for security programs established as national policy for civilian personnel by Executive Order 10450 as amended by Executive Order 10491.

2. This directive prescribes the standard and criteria for the separation of military members from the Armed Services in the interest of national security and the rejection of applicants for appointment or enlistment or of persons who would otherwise be inducted or involuntarily ordered into active military service whose acceptance into the services is not clearly consistent with the interests of national security. This is an administrative directive and does not preclude trial by court-martial when such action is considered appropriate by an Armed Service. It does not preclude separation on grounds other than security reasons under other applicable directives. Further, procedures pursuant to this directive should not be used in those cases in which security considerations are not the primary reason for initiation of action with a view toward separation.

B. *Scope*

This directive applies to all male and female commissioned officers, warrant officers, and all other members and prospective members of the Armed Services, including the Coast Guard when the Coast Guard is operating as a part of the Navy Department.

II. GENERAL POLICY

The Department of Defense will assume that the acceptance or retention of any member of the Armed Services is clearly consistent with the interest of national security unless and until a determination to the contrary is made by competent authority in the Armed Service concerned. However, when credible information which raises the question of security is received, action will be taken to determine whether acceptance or retention is consistent with the interests of national security. In no case will any person, reasonably believed to have at any time engaged in any of the activities listed in VII, C, 1, below, be appointed or enlisted in any of the Armed Services without the approval of the Secretary of the Armed Service concerned. Any member who is separated under the provisions of the appropriate Armed Service directive issued in implementation of this directive, or whose records reflect that he was separated under other authority while undergoing investigation under the provisions of such directive, will not be appointed or enlisted in any of the Armed Services at a later date without approval of the Secretary of the Armed Service concerned.

III. DEFINITION

National Security. As used herein, the term “national security” relates to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, and subversion, and any and all acts designed to weaken or destroy the United States.

IV. CANCELLATION

References (a), (b), and (c), above, are cancelled.

V. REPORTING OF INFORMATION

It shall be the duty of every member of the Armed Services to report to his commanding officer any information coming to his attention which indicates that retention of any member of the Armed Services is not clearly consistent with the interests of national security. Investigations by activities of the Armed Services will develop all relevant facts with special emphasis being given to that information which supports or refutes an allegation stemming from the criteria hereinafter described.

VI. DISPOSITION OF PENDING CASES

The processing of all security cases will be in accordance with instructions issued in implementation of this directive.

VII. STANDARD AND CRITERIA

A. *Standard.*

The standard for appointment, enlistment, or retention within the Armed Services shall be that on all the available information it is determined that the appointment, enlistment, or retention is clearly consistent with the interests of national security.

B. *Criteria for Application of Standard.*

An officer or warrant officer of the Armed Services holds a sensitive position by virtue of his commission or warrant regardless of the duties and responsibilities of his assignment. Likewise, an enlisted member whose qualifications would normally require that he have access to classified information or material will be considered to

hold a sensitive position regardless of the duties and responsibilities of his assignment. Nothing herein will serve to preclude temporary assignment to specially controlled duty as a security measure. However, indefinite assignment to such duty will be made only as prescribed by the Secretary of the Armed Service concerned.

C. *Application of Criteria.*

1. The ultimate determination of whether acceptance or retention in the Armed Services is clearly consistent with the interests of national security must be an over-all common sense determination based on all available information. The activities and associations listed below, whether current or past and while not all inclusive, are of varying degrees of seriousness and warrant initiation of action to effect such determination:

a. Commission of any act of sabotage, espionage, treason or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

b. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests are inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

c. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration

of the form of Government of the United States by unconstitutional means.

d. Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights, under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means. (An organization, movement, or group, officially designated by The Attorney General of the United States to be totalitarian, Fascist, Communist, or subversive, to advocate or approve forcible or violent denial of Constitutional rights, or to seek alteration of the form of Government of the United States by unconstitutional means, shall be presumed to be of a character thus designated until the contrary be established).

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Failure or refusal to sign loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, in refusing to completely answer questions contained in DD Forms 98, 390, or 398; pleading protection of the Fifth Amendment or of Article 31, Uniform Code of Military Justice, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, con-

ducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described in a through e above, and g through m below.

g. Participation in the activities of an organization as a front for an organization referred to in d above, when his personal views were sympathetic to the subversive purposes of such organization.

h. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

i. Participation in the activities of an organization referred to in d above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

j. Sympathetic association with a member or members of an organization referred to in d above.

k. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in a through i above. A close continuing association may be considered to exist if the individual lives at the same address as, frequently visits, or frequently communicates with such person.

l. Close continuing association of the type described in k above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

m. Any facts, other than as set forth in 2, below, which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may

cause him to act contrary to the best interests of national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister, or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

2. Separation Under Other Appropriate Directives or Regulations.

Persons who fall within the criteria prescribed below are examples of members whose retention may not be clearly consistent with the interests of national security. However, action will not be initiated to separate them under this security program unless the criteria set forth in VII, C, 1, above is also substantially involved and action under other Armed Service directives or regulations or the Uniform Code of Military Justice has been determined to be inappropriate.

a. Willful violation or disregard of security regulations.

b. Intentional unauthorized disclosure to any person of classified information, or of other information disclosure of which is prohibited by law.

c. Any deliberate misrepresentation, falsification, or omission of material fact.

d. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

e. All other behavior, activities, or associations which tend to show that the member is not reliable or trustworthy.

VIII. ADMINISTRATIVE POLICIES.

The Secretary of each of the Armed Services will prescribe procedures to be taken within his department to implement this directive. Procedures so established shall be governed by the following:

A. *Loyalty Certificate.*

The following persons will be required to accomplish a DD Form 98 (Loyalty Certificate for Members of the Armed Forces).

- * 1. Each applicant for appointment or enlistment *
- * prior to his appointment or enlistment. *
- * 2. Each inductee prior to induction. *
- * 3. Each member of a Reserve component of the *
- * Armed Services or retired member voluntarily or *
- * involuntarily entering upon a tour of extended active *
- * military service immediately upon reporting to the *
- * initial activity to which his orders require him to *
- * report for such duty. *

B. *Application for Appointment.*

The completed DD Form 98 and DD Form 398, and where applicable DD Form 390, will be attached as an inclosure to the application for appointment. If an applicant fails or refuses to accomplish the DD Form 98 in its entirety his appointment will be denied. If the DD Form 98 is completed with qualification or entries are made thereon which provide reason for belief that his appointment is not clearly consistent with the interest of national security, such appointment will be held in abeyance and the application and allied papers will be processed as may be directed by the Secretary of the Armed Service concerned.

C. *Application for Enlistment.*

If an applicant for enlistment fails or refuses to accomplish the DD Form 98 in its entirety, his enlistment will be denied. If the DD Form 98 is completed with qualifications or entries are made thereon which provide reason for belief that his enlistment is not clearly consistent with national security, such enlistment will be held in abeyance and the application and allied papers will be processed as may be directed by the Secretary of the Armed Service concerned.

D. *Members of Reserve Component of the Armed Services.*

If a member of a Reserve Component of any Armed Service voluntarily entering or being involuntarily called or ordered into active military service fails or refuses to accomplish the DD Form 98 in its entirety or makes entries thereon which provide reason for belief that his entry is not clearly consistent with the interests of national security, he will normally not be permitted to enter into active military service and procedures prescribed by the Secretary of the appropriate Armed Service with a view toward separation will be followed.

E. *Inductees.*

1. Known communists will not be inducted into the
* Armed Services. The Federal Bureau of Investiga- *
* gation, Civil Service Commission and the Selective *
* Service System shall be notified promptly of their *
* rejection. *

#Revised 9 June 54

* 2. Whenever a person who is being processed for *
* induction refuses to accomplish satisfactorily DD *
* Form 98 in its entirety further process of induction *
* may be postponed pending completion of a thorough *
* investigation. In the event this investigation reveals *
* that his induction would be inconsistent with the *
* interests of national security he will not be accepted *
* into the service. *

* 3. Whenever a person who is being processed for *
* induction discloses on his DD Form 98 significant *
* derogatory information with respect to his background *
* further process of induction may be postponed pend- *
* ing completion of a thorough investigation. In the *
* event this investigation reveals that his induction *
* would be inconsistent with the interests of national *
* security he will not be accepted into the service. *

4. Doctors and dentists who are subject to induction and who apply for and are denied commissions for security reasons, except for those who in connection with their application for a commission refuse to accomplish DD Form 98 in its entirety or plead protection of the Fifth Amendment in refusing to answer completely questions contained in DD Forms 98, 390, 398, or other related forms, will be given an opportunity to be heard before an appropriate board of officers (Hearing Board) prior to induction. Before any case is referred to a Hearing Board, however, it will be reviewed by an appropriate Screening Board appointed by the Secretary of the Service concerned. The Screening Board will operate in accord-

#1st revision 9 June 54

2nd revision 2 Dec 54

3rd revision 16 Nov 55

ance with the procedures established by the Service Secretary concerned and will recommend to him, among other things, (a) whether the applicant should be tendered a commission, (b) whether the case should be referred to a Hearing Board, and (c) if a hearing is recommended, the information to be included in the letter of allegations. Hearing Boards will recommend that the applicant be (a) tendered a commission, (b) denied a commission but inducted in an enlisted capacity and used on non-sensitive assignments, or (c) rejected for service in any capacity on the basis that such service would be inconsistent with the interests of national security. These instructions are applicable to registrants having an obligation for service under subsection 4(i) only of the Universal Military Training and Service Act, as amended, as well as those having an obligation for service under subsections 4(a) (b) and (i) of the aforementioned Act.

F. *Separation of Members.*

1. Cases susceptible to resolution under court-martial procedure shall normally be so processed.

2. Where, for any reason, court-martial proceedings are inappropriate, impracticable, or inadvisable, administrative proceedings with a view toward separation of members whose continued service may not be clearly consistent with the interests of national security shall be initiated in accordance with applicable statutory authority.

3. In any administrative proceeding to separate a member of the Armed Services in the interest of national security, such member will be afforded an opportunity upon request to present any cause why he should not be so separated. Reasonable time will be afforded the member

to present his cause; however, a period in excess of 15 days may be granted only in case of a showing of vital need.

4. Administrative procedure, as directed herein, shall not be trials or adjudications, but shall be directed to the end of obtaining factual findings and unbiased opinions by boards of officers that the members under investigation are, or are not, persons whose continued services are clearly consistent with the interests of national security. These recommendations are subject to review by the Secretary of the Armed Service concerned. During any period of general mobilization the Secretary of the Armed Service concerned is authorized to delegate this review authority.

5. In cases where the approved findings and opinions of board of officers indicate that the continued service of a member of the Armed Services is not clearly consistent with the interests of national security, he shall be separated and the character of the separation shall be * predicated upon a careful consideration of all pertinent *
* factors including the gravity of substantiated derog- *
* atory information and the character of the service *
* performed. *

6. In the case of separation of any member of the Armed Services, under conditions outlined in the preceding subparagraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected.

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Revised 16 Nov 55

7. If administrative proceedings hereunder culminate in findings by boards of officers, approved by competent departmental authority, to the effect that there is no reason for belief that retention of the member concerned is inconsistent with the interests of national security, such findings shall be conclusive and binding, and, may, in the absence of subsequently developed information substantially controverting the earlier findings, support assignment of the member to normal duties.

8. The actions and procedures adopted by each of the Armed Services in implementation of this directive shall emphasize and make specific provision for prompt and expeditious resolution of each case which may arise.

G. Assignment Restrictions.

During the period when a member of an Armed Service is under investigation for security reasons, and during the administrative processing of any case arising therefrom, the member will be placed under such restrictions with respect to assignments and access to classified information as are required to protect the interests of national security.

H. Control of Investigative Information.

The reports and other investigative material and information developed by investigations conducted pursuant to directives in implementation of this program shall remain the property of the investigative agencies conducting the investigations. Such reports and other investigative materials and information shall be maintained in confidence, and no access shall be given thereto to other departments and agencies conducting security programs without the prior approval of the Secretary of the Armed Service concerned.

I. *Cooperation with Investigative Agencies.*

All services will cooperate fully with Federal investigative agencies, and will avoid action tending prematurely to warn suspects that they are under suspicion or to compromise confidential sources of information. In cases presenting any substantial reason for belief that retention in the Armed Services may facilitate investigation and/or prosecution by Federal agencies, such retention may be effected notwithstanding any other provision of this directive. Similarly administrative procedures with a view toward separation as directed herein may be withheld for a reasonable period pending completion of necessary investigation and advice by the investigative agency concerned that its missions will not be hampered by institution of such procedures.

IX. ACTION REQUIRED

Armed Service directives and regulations implementing this directive will be coordinated to insure uniformity with respect to methods, procedures, and safeguards and forwarded so as to reach this office not later than 60 days from the effective date of this directive.

X. EFFECTIVE DATE

The effective date of this directive is 7 April 1954.

C. E. WILSON

Secretary of Defense

IN THE
**United States Court
of Appeals**
FOR THE NINTH CIRCUIT

R. H. PHILLIPS and JESSIE E. PHILLIPS,
his wife, R. R. HAGGERTY and WINNIE
HAGGERTY, his wife, and D. EVERETT
PHILLIPS and EVELYN PHILLIPS, his
wife, individually and in behalf of the
Cold Creek Company, a partnership.

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15156

BRIEF FOR APPELLANTS

WALTER V. SWANSON
DOUGLAS A. WILSON
Attorneys for Appellants

FILED

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NO. 15156
IN THE
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

<p>R. H. PHILLIPS and JESSIE E. PHILLIPS, his wife, R. R. HAGGERTY and WINNIE HAGGERTY, his wife, and D. EVERETT PHILLIPS and EVELYN PHILLIPS, his wife, individually and in behalf of the Cold Creek Company, a partnership, <i>Appellants,</i></p> <p style="text-align:center"><i>vs.</i></p> <p>UNITED STATES OF AMERICA, <i>Appellee.</i></p>	}	No. 15156
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BRIEF FOR APPELLANTS

The appeal is by the defendants from judgments on the verdict in the Consolidated Cases, Civil No. 892, 488, 452, and 762, awarding the defendants compensation in an action for condemnation. The defendants have appealed because the Court rejected introduction of evidence as to the value of minerals, mineral rights, and mineral leaseholds after proffers were made, and as a result thereby the compensation awarded was inadequate and unjust.

STATEMENT OF JURISDICTION

The action was by the United States to condemn lands in Yakima County, Washington, pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Acts of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. Sec. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress

approved August 1, 1888 (26 Stat. 357; 40 U. S. C. Sec. 257) and the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U. S. C. Sec. 171) which Acts authorize the acquisition of land for military or other war purposes and the Act of Congress approved October 29, 1949 (Public Law 434—81st Congress), which Act appropriated funds for such purposes.

The judgments appealed from were entered November 30, 1955. R. 50-74. Defendants' motion for a new trial was denied January 6, 1956. R. 78-79. Notices of appeal were filed March 2, 1956. R. 79-82. This Court has jurisdiction upon appeal to review the judgment under Section 128 of the Judicial Code, as amended, 28 U.S.C.A., Sec. 255 (a).

STATEMENT OF THE CASE

The complaints in condemnation were filed December 17, 1952, to condemn certain leasehold interests (Civil Action Nos. 762, 452, and 488) and on February 15, 1954, as to certain fee simple title (Civil Action No. 892) to lands in Yakima County, Washington, for the purpose of adequately providing for an artillery range and for a training and maneuver area for troops in connection with the Yakima Artillery and Anti-Aircraft Firing Range. Civil Action No. 892, in which fee simple title was held by the appellants, involved a taking of approximately 33,213.13

acres. The mineral rights on 26,000 acres of said lands had been severed and dealt with by the appellants prior to the time of taking, and were owned by the Cold Creek Company, a partnership, comprising the appellants and Walter V. Swanson and Marjorie T. Swanson, defendants. Ex. 120, R. 233-234.

The sole question involved is the Trial Court's refusal to permit testimony and evidence to be submitted for the purpose of establishing a value to minerals, mineral rights, and mineral leaseholds in connection with said 26,000 acres.

The area involved in the taking had a record of being gas bearing, gas having been produced commercially for a period of approximately eleven years. R. 135. There is no record of commercial production of oil. In the years prior to the taking, and subsequent thereto, there was considerable activity in the leasing of land for mineral purposes by major oil companies. At the time of taking, the appellants had leased a substantial block of land to Shell Oil Company (rejected Ex. 97) for mineral exploration and development, and also had an option for mineral leases on the remainder of said lands to Laurent Regimbal, as agent for oil and gas concerns. (Rejected Ex. 96). All of the major oil companies were actively leasing in the area. R. 40-41, 236-242.

During the pendency of the action, on May 6, 1955, the appellants filed a petition for dismissal of mineral

rights from condemnation proceedings, R. 40-42, and on the 24th day of June, 1955, an order denying petition for dismissal of mineral rights from condemnation proceeding was entered. R. 42-43.

The Northern Pacific Railway Company, a defendant in Civil Case No. 892, having reserved mineral rights to the balance of the lands held by appellants Phillips and Haggerty, was dismissed from the trial, and the determination as to approximately 5620 acres of mineral rights was postponed until some future time by order of the Court dated October 24, 1955. R. 69-70, (Judgment on Verdict), R. 129, 130.

In the trial of the consolidated cases, the Trial Court indicated immediately that he was "quite disturbed . . . about this mineral rights situation." R. 88. He endorsed the position of government counsel that "unless the land is a proved field or reasonably adjacent to a proved field, which isn't the situation here, that mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist there. And, having been through these cases before, *I don't think it is possible to show reasonable probability* of gas and oil values under these lands." R. 89. (Italics mine).

The Trial Court further stated, "I can't see how as a practical matter you could prove how much the possibility of leasing for exploration would enhance the

market value of this land unless you could show how much is paid by oil companies for leases, and then you get back to the proposition of putting in these leases and the amount that the owner would get for exploration leases, which I think is clearly improper because it is too speculative." R. 89.

The record shows that counsel for appellants sought by stipulation with the government to separate mineral values from the remaining value, the Court having conceded that "the exploitation of mineral value would not be inconsistent with agricultural value," R. 92, but no stipulation was entered into between the parties.

Thereafter, counsel for appellants made repeated proffers of exhibits and testimony in connection with establishing a value incident to mineral rights as a result of the lands being a part of an active leasing area. R. 134, 135. Appellants sought to introduce the testimony of a geologist from Shell Oil Company to testify as to the presence of factors in the area necessary for exploration of gas and data as to existing leases in the field, R. 170, and the testimony of a lease agent from Carter Oil Company, a subsidiary of Standard Oil Company, to testify as to dealings in mineral leases and rights in the area, including his own activities. R. 170.

A proffer was made as to the existence of and development of gas in the area. R. 173, 174.

Exhibit No. 97, a lease on mineral rights from the

appellants to the Shell Oil Company, prior to taking, and Exhibit 96, an option to lease from appellants to Laurent Regimbal, were proffered, R. 207-210, and the Court at that time reserved ruling, R. 210-212, stating, however, that "I take the position that the existence of these prospecting leases becomes material only in the event it is shown that there are mineral right values or minerals of substantial value in the property, and that if there isn't anything shown on which there could be compensation for minerals, the fact that there are mineral leases is immaterial."

Exhibit 120, the deed of mineral rights from the defendants individually to the Cold Creek Company, comprising the appellants and the Swansons, defendants, Exhibit 96 and Exhibit 97, were later in the course of the trial admitted by the Trial Court for the sole purpose of consideration by the Court as to the state of the title, the Court again reserving ruling as to whether said exhibits should be submitted to the jury. R. 233-235.

Counsel for the appellants prior to closing appellants' case then made a formal offer of proof encompassing all that had gone before and developing further the evidence, both as to oral testimony and written exhibits, sought to be introduced. R. 236-242. Said offer of proof outlined the evidence appellants believed would establish a definite basis for ascertainment of mineral values by the Court and jury, and included the following facts:

1. The basic factors which govern the decision by major oil companies of whether to invest in leaseholds and to explore for oil.

2. The presence and existence of a sufficient number of said factors in the subject land.

3. The probability of oil or gas in the area, based on geological surveys.

4. That the area in question constituted an active leasing area of common knowledge among oil people and owners of real estate.

5. That Shell Oil Company, Ohio Oil Company, Texas Oil Company, Richfield Oil Company, and Standard Oil Company are and have been leasing mineral rights in said area.

6. That recent sales of lands in the area have all involved a reservation of mineral rights.

7. That the leasehold interest in mineral leases, the landowners' mineral estate, and the option to lease for mineral rights all have a definite ascertainable value.

8. That companies make a business of investing in a percentage of the mineral estate remaining in the landowner after a lease of the mineral rights to a major oil company.

The Court then rejected Exhibit 96, the option to lease from appellants to Regimbal, and Exhibit 97, the

mineral lease from appellants to Shell Oil Company, and Exhibit 120, the Cold Creek Company lease, indicating that said exhibits were not proper evidence to determine value at time of taking. R. 252, 253. Testimony by the Shell geologist, Mr. Valentine, and the Carter Oil land man, Mr. Beam, together with all the other elements of proof set forth above, were rejected, the Court holding that such evidence proffered "would be entirely speculative in nature as to the possibilities of there being oil or gas here in *a completely undeveloped and undiscovered area.*" (Italics mine). R. 250. The Court emphasized that there must be "discovery or development of commercial proportions . . . in the vicinity." R. 250. The Court's ruling in part is as follows:

"I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.

"And I think that will be my ruling here, that I will not submit this for the jury and will not submit to them the leases which have been received in evidence. They will be here for the purpose of showing the state of the title." R. 252-253.

The Court further stated in conclusion:

"There is this matter that occurs to me: I think it would be extremely dangerous in a case of this kind to submit to the jury the question of whether or not

there is substantial mineral value here and allow them to place an unknown value, a value which we wouldn't know they had placed, when their verdict came in. If they returned a verdict, as the owners hope they will, of upward of a million dollars, no one could ever tell whether \$10 or \$500,000 of that was based upon their idea of what these minerals might be worth, and if I should happen to be wrong, which it is my best judgment I would be, if I submitted it, the case would be upset in the Court of Appeals and it would come right back here a couple of years from now and we would start all over again to try this case again at that time. Of course, that is only a sideline observation because the basic responsibility of making these rulings rests on the trial court and that is where I recognize it is and that is where I accept it, and so the ruling is mine, I simply make this other observation as a sort of a sideline comment." R. 253-254.

The Trial Court, having rejected all proffered testimony and evidence concerning a determination of value as to mineral rights, instructed the jury as follows:

"Now, there has been some mention made of mineral rights here. I think I should tell you that that question has been carefully considered by the Court and the Court has come to the conclusion as a matter of law, and you are instructed, that there has been shown no substantial value here for mineral rights and you are not to award any value for mineral rights. You are to utterly disregard any evidence that may have come in or any mention of that matter." R. 259, 260.

The basic question on the appeal is whether all the proffered evidence as to mineral values, existing mineral leases, and the buying and selling of mineral estates was properly excluded by the Court. In making its ruling concerning the inadmissibility and rejection of said evidence,

the Trial Court admitted that, "There seems to be an increasing activity here in this area in the way of leases for prospecting of gas and oil." R. 252.

By reason of the exclusion of evidence as to said values, and the fact that the jury had no opportunity to translate the loss of these valuable rights and property interests into the equivalent in money, the appellants therefore were deprived of "just compensation," the verdict as to Civil Case No. 892 being inadequate as a matter of law.

Although the diminution of the verdict was directly related only to Civil Case No. 892, the refusal of the Trial Court to admit the evidence as to mineral values, the partisan attitude of the Trial Judge in dealing with this problem and in excluding the evidence, inured in the verdict as to all four consolidated cases. The inevitable result was that appellants were denied a fair and impartial trial and the right safeguarded by the Fifth Amendment that private property shall not be taken for public use without just compensation.

SPECIFICATION OF ERRORS

1. Rejection of Defendants' Exhibit 96—an option to lease mineral rights from appellants and defendants Swanson to Laurent Regimbal, and Exhibit 97—a mineral lease from appellants and defendants Swanson to Shell Oil Company, at 25c per acre, both of said exhibits being

executed prior to the taking for valuable consideration, and both dealing with subject lands. R. 234-241.

Evidence offered to show proof of the following facts:

a. Value of appellants' mineral estate, through rental payments and possibiltiy of oil or gas production.

b. Highest and best uses of land not inconsistent with agricultural use.

Evidence rejected by the Court for the reason that "allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation." R. 252-253.

2. Rejection of proffers of testimony of Mr. Valentine of the Shell Oil Company, and Mr. Beam of Carter Oil Company, a subsidiary of Standard Oil Company, said testimony to establish sub-surface geology of area, and to establish a contractual interest in the geology of the subject property by major oil companies, to prove probability or possibility of oil or gas development and production, to establish that condemned lands were within an active leasing area, to set forth all transactions in the area as to purchase and sale of leasehold interests and mineral estates. R. 170, 236-242.

Evidence offered as proof of:

a. Real and ascertainable value of mineral leaseholds, and mineral estates.

b. Active barter in mineral leaseholds and mineral estates.

c. Possibility of oil or gas production.

Evidence rejected by the Court for the reason that “allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.” R. 252-253.

3. Requirement by the Trial Court that the appellants conduct their case in accordance with the desires of the Court as to order and manner of proof, thereby denying appellants a fair trial and due process of law.

ARGUMENT

1. Appellants Denied Just Compensation by Erroneous Exclusion of Evidence.

The discussion on the first two errors relied upon, concerning exclusion of evidence, can be considered together. The basic error relating to said exclusion of evidence is that as a result the appellants were deprived of “just compensation” as a matter of law.

The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been

taken. *U. S. v. Miller*, 317 U. S. 369, 373; 63 S. Ct. 276, 279; 87 L. Ed. 336.

In *Olson v. U. S.*, 292 U. S. 246, 255, 54 S. Ct. 704, 708, the Supreme Court stated as follows:

“In respect to each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it, that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, 124; 44 S. Ct. 471; 68 L. Ed. 934, 941.”

The Supreme Court has further held that the ascertainment of value is not controlled by rigid rules or artificial formula. What is required is “a reasonable judgment having its basis in a proper consideration of all relevant facts.” *Minnesota Rate Cases*, 230, U. S. 352, 434, 33 S. Ct. 729, 57 L. Ed. 1511. *Standard Oil Company of New Jersey v. Southern Pacific Company*, 268 U. S. 146, 156, 45 S. Ct. 465, 69 L. Ed. 890.

In *U. S. v. General Motors Corp.*, 323 U. S. 373, 378, 65 S. Ct. 357, 359, 89 L. Ed. 311, the Supreme Court declared:

“Property . . . denotes the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it . . . The constitutional provision is addressed to every sort of interest the citizen may possess.”

The evidence which counsel for appellants attempted to introduce, including the Shell Oil Company mineral lease, Exhibit 97, and the Regimbal mineral option, Exhibit 96, would have established that the appellants at the time of taking had received and would in all probability receive in the future 25c an acre for leasing all or a substantial part of the 26,000 acres. Further evidence sought to be introduced, including the testimony of Mr. Beam and of Mr. Valentine, would have established that there was considerable activity by the major oil companies and independents in the purchase and sale of mineral leases and mineral royalties and that the major oil companies in the area had paid from 25c to \$2.00 per acre for mineral leases. Said proffered testimony would have further established that in the opinion of the geologists and experts of the major oil companies, including Mr. Valentine of Shell Oil Company, the entire 26,000 acres which the appellants owned constituted an active leasing area of common knowledge among oil people and owners of real estate, R. 239, and that the factors present indicated the probability of the existence of gas or oil in the area. The offer of proof further stated that the testimony of Mr. Beam would establish that persons of ordinary business judgment were investing in mineral estates in the area, that is to say, buying a portion of the landowner's remaining interest after a lease to a major oil company. R. 240. Mr. Beam would also have testified that there is a very real value in a mineral lease and in

an option for a lease in a so-called wildcat area even though there has not been a strike of oil. R. 241. The offer of proof would further have established that the area was in the past for a minimum of eleven years a producing area for gas. R. 135.

Can it arbitrarily be said, without having heard the testimony of any one of the proffered witnesses, that the mineral interests in connection with the 26,000 acres of condemned land are valueless? Such a finding goes against common sense and logic. As a matter of fact, with the proffered evidence that major oil companies were then spending and have since spent money for oil leases and oil development, any reasonable person would admit that in the event of the sale of land, these factors would be considered by both the seller and the purchaser. As a result a higher price would be paid than if there were no activity whatsoever in connection with mineral leasing and exploration.

The property rights taken away from appellants by the sovereign without even nominal compensation are as follows:

1. Right to receive 25c per acre from Shell Oil Company under existing lease.
2. Right to receive 25c per acre from Regimbal or his assignee upon exercise of the option to lease.
3. Right to bargain for and sell leasehold interest to

major oil companies in any lands not covered by Shell lease or taken up by Regimbal, at 25c per acre or more.

4. The right to bargain for and sell a percentage or all of the interest of appellants in the mineral estate, whether they have previously leased to a major oil company or not.

5. The right to benefit as dominant owner of the mineral estate from possible oil or gas production.

The value of each of the above property rights would of course vary, from tremendous values if oil or gas were commercially produced in the area, to a lesser value based only on the income from leaseholds and mineral estates. R. 241.

However, if the evidence sought to be introduced was received, and properly presented in accordance with the offers of proof, the jury could find a minimum value to the dominant owners of the mineral rights, as lessors, of 25c per acre for the 26,000 acres. Ex. 96, 97. If the witnesses further established a market value in the dominant mineral estate, R. 240, which value was fixed at \$1.00 per acre for a half interest in a transaction relating to land in the immediate area, R. 76, then the jury could further find that said dominant mineral estate had a real and tangible value.

It appears in the record that a proffer was made that gas in commercial quantities was produced in the area

for a period of eleven to fourteen years, serving a substantial part of the Yakima Valley. R. 135, R. 173. Although this commercial production ceased some twenty-five years ago, this time span is insignificant in a determination of whether or not there is a reasonable possibility of oil or gas production in the area in question. In the past ten years, the major oil companies of the United States, faced with dwindling oil reserves, and greatly increased demand, have engaged in extensive oil and gas exploration, always necessarily preceded by intense activity in leasing of mineral rights and purchasing of mineral rights.

The instant case is the only one that has come to the attention of counsel for appellants where the Trial Judge, dealing with condemnation of lands in an active leasing area, and with severed mineral estates and leaseholds, rejected the admission of evidence and testimony at the time the proffers were made. There are cases where the Trial Court instructed the jury that the evidence was insufficient to warrant their considering mineral value; of instructions limiting the jury in the determination of mineral values; and of instructions setting forth the degree of proof necessary to establish mineral values. But in no other case did the Trial Court deny entirely to the landowners the opportunity to prove their case as to possible mineral values.

Consideration of cases involving leasehold interests

and mineral rights in the federal courts shows an increasing recognition by the courts that mineral rights, other than actual production of gas and oil, have a real and ascertainable value in our world of today.

In *Montana Railway Company v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 97, 34 L. Ed. 681, the Supreme Court, with reference to an undeveloped mining claim, said as follows:

"It may be conceded that there is some element of uncertainty in this testimony, but it is the best of which, in the nature of things, the case was susceptible. That this mining claim which may be called 'only a prospect,' had a value fairly denominated a 'market value,' may be, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects were the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value."

It is stated further:

"In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate."

And in the *Eagle Lake Improvement Co. v. United States*, (5th C.C.A.), 141 F. (2d) 562, at 564, the Appellate Court stated:

" . . . The instructions to which objection was made in substance charged that the jury should find the mineral interests valueless unless from the evidence

it was believed that a reasonable probability existed that oil or gas in paying quantities might be produced. As held in *Olson v. United States*, 292 U. S. 246, 257, 54 S. Ct. 704, 78 L. Ed. 1236, elements affecting value that depend upon occurrences which, though possible, are not reasonably probable, should be excluded from consideration as too speculative and conjectural to afford a basis for the judicial ascertainment of value. In Texas, however, a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' In any event, such leases have a nominal value."

In *Southern Pacific Railway Co. v. San Francisco Savings Union*, 79 Pac. 961, 964, the Supreme Court of California, referring to reservation of mineral rights by landowner in a deed to the railroad, said:

"It no doubt will always be more difficult to prove whether a reserved right in oil is valuable or not, much more so than such a right in fixed minerals; but it cannot be said impossible to do it."

In the instant case appellants were never even given the opportunity to try, and it thereby became impossible to do it.

The most recent case in point is that of *Cal-Bay Corporation et al v. United States*, 9th Cir., 169 F. (2d) 15; cert. den., 69 S. Ct. 134; 335 U. S. 859; 93 L. Ed. 406,

The Trial Court in the Cal-Bay Corporation case gave an instruction in part to the effect that "Future income or speculative productive value contemplated is not a measure of condemnation value." The Court had refused to give the following instruction proposed by defendants:

"This action concerns the value of the gas and oil rights and the leases given for such development on the lands taken by the Government. Gas and oil leases are recognized by law as being property having a market value even if such leases are in undeveloped territory. Where gas and oil rights are concerned a reasonable probability of successful development is sufficient to make such leaseholds of great value. Where there is reasonable possibility of production in paying quantities gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value.

"There is a definite market value even where the prospects of successful development are too speculative to be reasonably probable. If the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transactions for valuable considerations, they have a market price translated into a fair market value for condemnation purposes."

The Appellate Court held that the Trial Court erred in refusing such an instruction, stating in part as follows:

"We think the district court erred in refusing such an instruction. We take notice that, in California, discovery in land of a reasonable probability of successful development of gas or oil gives great value to such land and that it has a market value even where the prospects of possible successful development are too speculative to be reasonably probable. The evidence, later quoted, shows there are hundreds of sales of

lessor and lessee rights in lands with such speculative value.”

In the instant case, also, had the appellants been afforded the opportunity, they could have shown many sales of lessor and lessee rights in lands with speculative value, through the testimony of the proffered witnesses.

The Appellate Court in the Cal-Bay case stated further:

“That such speculative value is provable in such condemnation proceedings has been recognized by the Fifth Circuit in a case concerning such interests in lands in the southern district of the oil producing State of Texas. *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F. 2d 562, 564.”

An application of the foregoing rules to the proffers made and evidence sought to be admitted justifies the assumption that if the appellants had been permitted to introduce said proof there would have been established additional values to be considered by the jury, within the limits of an appropriate instruction by the Court.

In the case of *Cal-Bay Corporation et al v. United States*, supra, and of *Eagle Lake Improvement Co. v. United States*, supra, it was held that erroneous instructions constituted prejudicial error. The instructions might well have led the jury to bring in a lesser amount and therefore the landowners would not have received “just compensation.”

In the instant case, however, the effect of the erron-

eous exclusion of evidence is even more apparent. The jury was not permitted to even consider mineral values. The verdicts, therefore, could not, and did not, reflect any valuation whatsoever as to mineral rights, and could not represent "fair compensation."

It is conceded that if the rejected evidence had been admitted, and a proper instruction given, the jury might well have returned a considerably greater verdict, or perhaps only a nominal increase. But a determination of values is rightfully, and should have been, a matter for the jury to decide. These proffers related to material and relevant evidence. It was error to exclude them. See *Knollman v. United States*, 214 F. 106, 108.

The Trial Judge must necessarily have relied upon personal knowledge or belief or experience concerning oil and gas matters in order to arbitrarily reject the proffers of evidence. R. 89.

The Court acknowledged the increased activity here in this area. R. 252. Yet the Court substituted its judgment for that of the jury, and arbitrarily excluded the evidence and testimony which could well have established that said increased activity had brought with it a real and ascertainable value as to mineral leaseholds and mineral estates. The Court referred to the Martinez case, R. 89, stating that:

"Now I think in a prior case I did submit the rather tenuous proposition that the jury could find how much

the market value of the land had been enhanced by the possibility of leasing it for exploration purposes, but, frankly, I am getting a little concerned about that and doubtful about it."

Counsel for appellants pointed out that he could present a stronger case as to proof of mineral values than the Martinez case, because the area was an active leasing area at the time of taking in the instant case, and was not in the Martinez case. R. 134. The Court observed:

"Well, as far as my following this instruction is concerned it is helpful to have at hand what you have said in some prior case, but, of course, a judge should be like a wild goose, every day is a new day, and I am not bound to anything that I did even yesterday even as far as today is concerned." R. 135-136.

No fault can be found with this expression of judicial procedure, but it is most respectfully contended that the change of policy in this instance, which was reflected in the exclusion of material and relevant evidence, seriously prejudiced the entire case for the appellants.

The Trial Court emphasized its own error in excluding evidence of mineral values when it instructed the jury as follows:

"The Court has come to the conclusion as a matter of law, and you are instructed, that *there has been shown no substantial value* here for mineral rights and you are not to award any value for mineral rights." R. 260. (Italics mine).

It is difficult to conceive how the appellants could have "shown" value for mineral rights when they were

precluded from presenting the evidence they had assembled.

The Trial Court, in excluding the proffered evidence, attempted to justify its action as follows:

“Unless the land is a proved field or reasonably adjacent to a proved field . . . mineral values, as such, cannot be made the basis of compensation, unless there can be shown *reasonable probability* that they exist here. And *having been through these cases before*, I don’t think it is possible to show reasonable probability of gas and oil value under these lands.” (Italics mine). R. 89.

The testimony of the expert witnesses which the appellants sought to introduce, would have established the fact that proximity of land to a commercially producing mineral area does not of itself determine whether that land has sub-surface oil or gas. Land could lie one mile off an anticline or structure and be therefore devoid of even the possibility of having oil or gas. It is the sub-surface structure of the land, not the proximity to producing wells, that governs whether or not there is a reasonable possibility of valuable deposits being found. Yet the testimony which would have proven “reasonable possibility” was excluded.

The Court then stated, with reference to the Eagle Lake Improvement Co. case, *supra*:

“In Texas and under Texas law a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory, and I

submit this is not the law in this jurisdiction.” R. 251.

The Court finally held that:

“I think that the rule that should be applied here is the one that, since I think the Court can almost take judicial notice of the fact that this land is not in or anywhere near a commercially producing mineral area, gas and oil area, that allowing a jury to place a valuation on mineral rights or on the right to lease it for prospecting for gas and oil would be too speculative and remote to form the basis for compensation.” R. 252-253.

Appellants respectfully submit that the above reasons expressed by the Trial Court as basis for the refusal to permit evidence to be given as to mineral values incorrectly state the law in this jurisdiction, as set forth in the Cal-Bay Corporation case, *supra*. The Appellate Court therein cited with approval the language of *Eagle Lake Improvement Co. v. United States*, *supra*, at p. 564, yet the Trial Court summarily states that “this is not the law in this jurisdiction.” R. 251. The Trial Court has misapplied the rule of “reasonable probability” R. 89, and refused to recognize the law of this jurisdiction that “where there is a reasonable possibility of production in paying quantities, gas and oil leases are common subject of barter and sale and, therefore, have definite ascertainable market value.” This rule would be equally applicable to mineral rights of the dominant owner, in this case, the appellants.

2. Appellants Were Denied a Fair Trial and Due Process of Law.

The error of the Trial Court in denying admission of the exhibits and testimony in question would be directly reflected only in the single cause of action, Civil Case No. 892. However, by reason of the Court's conduct of the case it is the further contention of appellants that their entire presentation as to all four consolidated cases was prejudiced. By the arbitrary actions of the Trial Judge, counsel for appellants was prevented from making an orderly and persuasive presentation of appellants' case.

CONCLUSION

As to Civil Case No. 892, the rejection of proffered evidence as to mineral values is clearly reversible error. All property rights that were capable of being translated into value should have been permitted to be introduced into evidence and considered by the jury, subject to proper instructions in accordance with the laws of this jurisdiction. The direct consequence of the Trial Court's error was that the verdict of the jury as to Civil Case No. 892 was inadequate as a matter of law.

As to the leasehold cases, Civil Cases Nos. 452, 488 and 762, the Trial Court, in arbitrarily excluding evidence and testimony, seriously prejudiced the presentation of appellants' entire case. Such reversible prejudice would necessarily be reflected in the verdicts of the jury as to said leasehold cases as well as the fee simple title case.

It is respectfully submitted that the appellants have

been thereby deprived of just compensation under due process of law and are entitled to a new trial.

Dated, Yakima, Washington,
October 11, 1956.

WALTER V. SWANSON
DOUGLAS A. WILSON
Attorneys for Appellants

No. 15157

United States
Court of Appeals
for the Ninth Circuit

EARL BENNETT,

Appellant,

vs.

E. W. BAILLY, Trustee in Bankruptcy, of Proc-
tor's Monte Cristo, Inc., a Corporation, Bank-
rupt,

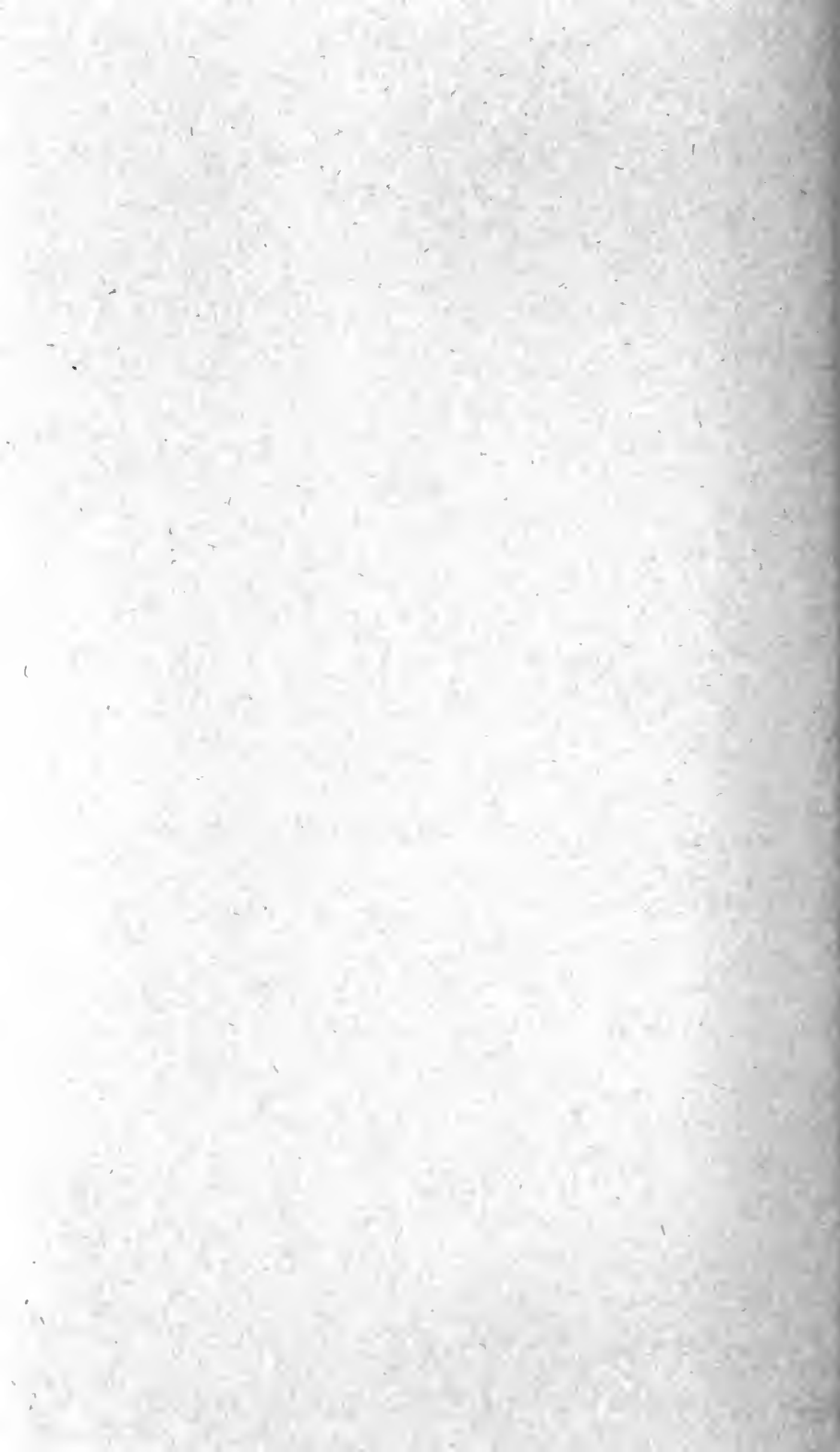
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

NOV - 1 1956



No. 15157

United States
Court of Appeals
for the Ninth Circuit

EARL BENNETT,

Appellant,

vs.

E. W. BAILLY, Trustee in Bankruptcy, of Proc-
tor's Monte Cristo, Inc., a Corporation, Bank-
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Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California

ORDERS OF ADJUDICATION AND
OF GENERAL REFERENCE

At Los Angeles, in said District, on March 4, 1955.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 65347 WB.

Title of Proceedings: Proctor's Monte Cristo, a Corporation.

Filed: 3-4-55.

Referee: Nelson C. Peters, Esq., Los Angeles, Calif.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States for the
Southern District of California, Central Di-
vision

In Bankruptcy No. 65,347-WB

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Corpora-
tion,
Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE
To the Honorable N. C. Peters, Referee in Bank-
ruptcy:

Comes now E. W. Bailly, and respectfully rep-
resents:

I.

That he is the duly appointed, qualified and act-
ing trustee in the above-captioned bankruptcy mat-
ter.

II.

An examination by your trustee herein has de-
veloped the following facts concerning a certain
on-sale liquor license, No. P-11129: this liquor li-
cense originally stood in the name of Niel Mc-
Dermott; that sometime in the month of October,
1954, the said McDermott entered into an escrow
with the bankrupt corporation for the transfer of
the said liquor license for and in consideration of
the payment of the sum of \$18,000; that the said
\$18,000 was paid by Earl Bennett by a personal
check deposited in the escrow and the said license
was forthwith transferred to the bankrupt corpora-

tion; that the said license has at all times, and does now, stand in the name of the bankrupt corporation; that on or about January 13, 1955, Earl Bennett made application to the California [3*] State Board of Equalization and gave notice of intention to transfer the said liquor license to the said Earl Bennett without consideration; that your petitioner is further informed and believes and therefore alleges that the said transfer has not as yet been accomplished but is being held in abeyance pending this bankruptcy proceeding; that the transfer of the liquor license to the said Bennett without consideration would constitute a fraud upon the creditors of this bankrupt estate inasmuch as the same is being accepted without consideration.

Wherefore, your petitioner prays that an order to show cause issue on Earl Bennett and the Board of Equalization of the State of California to be and appear before the Referee in Bankruptcy on a day fixed, and then and there show cause, if any they may have, why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett; and

Your petitioner further prays that a temporary restraining order issue on Earl Bennett and on the Board of Equalization of the State of California forbidding and restraining the transfer of the on-

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

sale liquor license until a final order is entered in the within proceedings.

Dated: March 25, 1955.

/s/ E. W. BAILLY,

Trustee in Bankruptcy.

CRAIG, WELLER &

LAUGHARN,

By /s/ C. E. H. McDONNELL,

Attorneys for Trustee.

Duly verified. [4]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER BASED THEREON

This matter having come on for hearing on the verified Petition for Order to Show Cause of E. W. Bailly on April 5, 1955, at the hour of 9:30 a.m. thereof; and Trustee having appeared in person and represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and respondent Earl Bennett having appeared in person and represented by his counsel, Miller Vandegrift and Middleton, and Darwin H. Wolford by Thomas J. Middleton, and the Department of Alcoholic Beverage Control of the State of California having also appeared as respondent; and evidence both oral and documentary having been offered and received, and the matter having been taken under submission pending the filing of briefs, and it appearing that briefs have been filed herein, the Court does not

make the following Findings of Fact, Conclusions of Law and Order Based Thereon: [6]

Findings of Fact

I.

The Court finds as true that the within bankruptcy proceedings were commenced by the filing on March 4, 1955, of a Voluntary Petition in Bankruptcy by Proctor's Monte Cristo, Inc., a California corporation, and that immediately upon such filing the said corporation was adjudicated a bankrupt. The Court further finds as true that on March 5, 1955, an Order was made referring the above-captioned bankruptcy proceedings to the Honorable N. C. Peters, Referee in Bankruptcy. The Court further finds as true that on March 22, 1955, the First Meeting of Creditors was held before Referee Peters in San Bernardino, at which time E. W. Bailly was nominated, elected and confirmed as Trustee in bankruptcy for Proctor's Monte Cristo, Inc., the bankrupt herein, and that the said E. W. Bailly immediately thereupon filed his bond in the sum ordered by the Court, and qualified and from and after March 22, 1955, the said E. W. Bailly did at all times act as Trustee in the above-captioned bankruptcy proceedings.

II.

The Court finds as true that prior to the commencement of bankruptcy proceedings herein the bankrupt had operated a bar and restaurant in San Bernardino, California, popularly known and described as "Proctor's Monte Cristo."

III.

The Court finds as true that on or about September 3, 1954, the bankrupt corporation entered into an escrow agreement with Neil McDermott, for the purchase of an "On Sale" Liquor License No. P-11129, for and in consideration of the payment of the sum of \$18,000.00. The Court further finds as true that thereafter the said escrow closed, and the said described liquor license was transferred to and placed in the name of the bankrupt corporation herein. [7]

IV.

The Court finds as true that the consideration of \$18,000.00 paid to Neil McDermott for the Liquor License No. P-11129 was paid as follows: Respondent Bennett paid \$500.00 outside of escrow to McDermott, and respondent Bennett deposited his personal check for \$17,500.00 in the escrow as the balance of the purchase price. The Court further finds as true that none of the purchase price of \$18,000.00 paid as aforesaid to McDermott came from the bankrupt corporation.

V.

The Court finds as true that on September 3, 1954, the bankrupt corporation and the respondent Earl Bennett, together with his wife, Isabelle L. Bennett, entered into an "Agreement Re Liquor License," which Agreement contained a personal guarantee by Thomas L. Proctor and Shirley Mae Proctor, which Agreement is attached hereto, marked Exhibit "A," and by this reference incor-

porated herein as though set forth in full at this point.

VI.

The Court finds as true that the corporation did not fulfill the terms of the said contract, either as to monthly payments or by reimbursing Bennett.

VII.

That by January, 1955, the bankrupt corporation was insolvent. The Court further finds as true that while insolvent in the month of January, 1955, the bankrupt corporation entered into an escrow agreement with Respondent Bennett to transfer On Sale Liquor License No. P-11129 to Respondent Bennett and his wife, Isabelle L. Bennett, without any consideration whatsoever.

VIII.

On Sale Liquor License No. P-11129 never stood at any time in the name of Earl Bennett and/or Isabelle L. Bennett, or either of them. [8]

Conclusions of Law

I.

The Court concludes that the On Sale Liquor License No. P-11129 is the property of this bankrupt estate.

II.

The Court concludes that the "Agreement Re Liquor License" is illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California,

and as an illegal contract is not binding upon this bankrupt estate.

Now, Therefore,

It Is Ordered that the Petition of the Trustee herein be, and the same hereby is granted, and it be and it hereby is fixed and determined that On Sale Liquor License P-11129 is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein.

/s/ N. C. PETERS,

Referee in Bankruptcy. [9]

7/21/1955.

EXHIBIT A

Agreement Re Liquor License

Whereas, Earl Bennett and Isabelle L. Bennett are personally paying the acquisition cost of a general on sale liquor license and are paying the sum of \$18,000.00 for said general on sale liquor license; and

Whereas, the said Bennetts propose to acquire same in the name of Proctor's Monte Cristo; and

Whereas, the said Bennetts are allowing the license to be taken in the name of the corporation;

Now, Therefore, it is hereby mutually agreed by and between Proctor's Monte Cristo, a corporation, and the said Bennetts that so long as the said corporation retains said liquor license, the said cor-

poration shall pay to the said Bennetts the sum of \$350.00 per month, the first of said monthly payments to be due and payable October 15, 1954.

The said Bennetts further grant to the said corporation an option to purchase said liquor license at any time on or before October 15, 1956, by paying to the said Bennetts the sum of \$18,000.00.

It is the further understanding of the parties hereto that should the corporation desire to exercise said option, the said corporation will be given no credit for whatever payments have been made as herein provided for prior to the time that said option is exercised.

It is the further agreement of the parties hereto that in the event the general on sale liquor license is suspended on two occasions by the State Board of Equalization, the Bennetts shall have the option of demanding the return of the liquor license and the corporation agrees to return said liquor license to said Bennetts within sixty (60) days after said demand is made, provided further that the said corporation, in the event such demand [10] is made by the Bennetts, shall have the option of either returning the said liquor license to the said Bennetts or paying the sum of \$18,000.00.

Proctor's Monte Cristo, a corporation, further promises and agrees that in the event it has not exercised the option to purchase liquor license, that it will on or before the 15th day of October, 1956, cause the said liquor license to be transferred to the said Bennetts or their assigns.

In Witness Whereof, the parties hereto have ex-

ecuted this Agreement re Liquor License this 3rd day of September, 1954.

/s/ EARL BENNETT,

/s/ ISABELLE L. BENNETT,

PROCTOR'S MONTE CRISTO,
a Corporation,

By /s/ THOMAS L. PROCTOR,
President;

By /s/ EARL BENNETT,
Secretary.

GUARANTEE

Come now Thomas L. Proctor and Shirley Mae Proctor and in consideration of Earl Bennett and Isabelle L. Bennett acquiring the general on-sale liquor license hereinabove referred to and causing same to be transferred to the name of Proctor's Monte Cristo, a corporation, the undersigned, Thomas L. Proctor and Shirley Mae Proctor, do hereby, both jointly and severally, guarantee to Earl Bennett and Isabelle L. Bennett that each and every agreement of Proctor's Monte Cristo, a corporation, hereinabove provided for, shall be fully and faithfully performed and that in the event the said Proctor's Monte Cristo, a corporation, does not make any of [11] the payments to the said Bennetts as hereinabove provided for or does not retransfer the said liquor license as hereinabove provided for, the undersigned personally promise to the said Bennetts that they will make such payments, or in the event the said Bennetts exercise the option requiring the return of the said liquor

license, the said Proctors will either cause said liquor license to be returned to the said Bennetts, or will personally pay to the said Bennetts the sum of \$18,000.00.

Dated this 3rd day of September, 1954.

/s/ THOMAS L. PROCTOR,

/s/ SHIRLEY MAE PROCTOR.

July 14, 1955.

Miller, Vandegrift, Middleton &
Darwin H. Wolford,
116 Surety Bldg.,
7335 Van Nuys Blvd.,
Van Nuys, California.

Attention: Darwin H. Wolford.

Re: Proctor's Monte Cristo, Inc.
No. 65347-WB

Dear Sir:

In reply to your letter of July 9, 1955, objecting to certain findings I will say that the reason I cannot allow said changes is, that while the equities are in favor of said respondents, Bennetts, the equities in favor of the creditors of the corporation and the rights held by the trustee are superior to the interests of the Bennetts.

The liquor license was placed in the name of the corporation under which the corporation incurred the debts set out in the schedules and creditors had a right to rely upon the fact that the license was in the name of the corporation and in relying thereon bankrupt incurred indebtedness without any notice

or knowledge by creditors of any equity of said respondents because of having advanced the money for the license to place it in the name of the corporation and the standing of the trustee in bankruptcy is superior to the claim of any secret lien holder or claimant.

Yours truly,

/s/ N. C. PETERS.

Copies mailed to:

Craig, Weller & Laugharn.

This letter should be attached as a finding.

/s/ N. C. PETERS,

Referee. [13]

Darwin H. Wolford
Attorney at Law
116 Surety Bldg.
7335 Van Nuys Blvd.
Van Nuys, California
State 5-1166

July 9, 1955.

N. C. Peters,
Referee in Bankruptcy,
211 Katz Bldg.,
San Bernardino, California.

Dear Mr. Peters:

In Re: Proctor's Monte Cristo, Inc.,
No. 65347-WB

I am in receipt of the proposed Findings of Fact and Conclusions of Law submitted by the Attorneys for the Trustee. An examination thereof indicates

their correctness in accordance with your Memorandum Decision, with the following exceptions, which I feel should be included.

Paragraph VII of said Proposed Findings of Fact should be changed and as changed should read as follows:

VII.

That by January, 1955, the Bankrupt Corporation was insolvent. The Court finds as true that while insolvent, in the month of January, 1955, the Bankrupt Corporation entered into an agreement with Respondent Bennett, to transfer on-sale Liquor License No. P-11129 to Respondent Bennett, and his wife, Isabelle L. Bennett; that the consideration for said transfer was that said Respondent Bennett had paid \$18,000.00 for said Liquor License, and the Corporation had paid no consideration for its use; that said Corporation was merely placing in Bennett's name, the License which should have been placed in his name in the first instance; that said Corporation was never entitled to receive said License, or to have same in its name.

We further object to the "Conclusions of Law" in the following particulars, and submit the following proposed changes:

We submit that Paragraph I of said Conclusions of Law should read as follows: [14]

I.

The Court concludes that the "On-Sale" Liquor License No. P-11129 was never legally, property of this Bankrupt Corporation.

We submit that paragraph II of said Conclusions should read as follows:

II.

The Court concludes that the issuance of the Liquor License to the Corporation is and was void ab initio, and that the license should have been issued to the Respondent, Bennett, in the first instance. The Court further concludes that an agreement attempting to hypothecate or pledge Liquor License as security, is illegal and void. The Court further concludes that it is not illegal to transfer a Liquor License to a party who has paid the full consideration for said License.

I have taken this means of suggesting these changes rather than to submit a complete set of Findings and Conclusions, because that would be merely a duplication. Of course it follows, that if the suggested changes are adopted, particularly in the Conclusions, that the Order submitted by the Trustee would be improper, but we do submit that the changes above suggested meet the factual and legal conditions.

Very truly yours,

MILLER, VANDEGRIFF &
MIDDLETON and

DARWIN H. WOLFORD,

By /s/ DARWIN H. WOLFORD.

DHW :lw

A carbon copy of the foregoing was this day, 7/9/55, mailed to:

Craig, Weller & Laugharn, Attorneys at Law,
111 West Seventh Street, Suite 817,
Los Angeles 14, California.

[Endorsed]: Filed August 19, 1955. [15]

[Title of District Court and Cause.]

DECISION ON CLAIM TO LIQUOR LICENSE

This matter came on for hearing April 5, 1955, upon a petition for Order to Show Cause issued against Earl Bennett, Department of Alcoholic Beverage Control of the State of California.

Thomas J. Middleton appeared as attorney for Alcoholic Beverage Control and Darwin H. Wolford attorney for Earl Bennett and C. E. H. McDonnell attorney for trustee, and

The matters were submitted to the Referee for decision upon stipulated facts and written briefs and arguments on the question of law and the Court after receiving written briefs and arguments of both parties and having considered the same, finds the facts and law in favor of the trustee and that the fact that Mr. Bennett paid Eighteen Thousand and no/100 (\$18,000) dollars for the license indicate that they are some real value in it and that creditors relied upon the license belonging to the corporation in extending credit to it which would not have been done otherwise.

The fact that it cannot be reached directly by creditors under levy or writ of attachment does not destroy its value as an equitable [26] asset. Money due an employee from the United States Government cannot be reached directly by writ of attachment or execution without the consent of said government, but it may be reached by proceeding in aid of execution. All the interest and equities of the estate pass to the trustee and the claim of Mr. Bennett will have to be denied.

Attorney for trustee may prepare findings.

Dated 6/23/1955.

/s/ N. C. PETERS,
Referee.

[Endorsed]: Filed August 19, 1955. [27]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON EARL
BENNETT AND STATE BOARD OF
EQUALIZATION FOR THE STATE OF
CALIFORNIA

Upon reading and filing of the verified petition for an order to show cause of E. W. Bailly, trustee in the above-captioned bankruptcy matter, and good cause appearing therefor,

Now, Therefore, upon motion of Craig, Weller & Laugharn by C. E. H. McDonnell, attorneys for the trustee,

It is Ordered that Earl Bennett and the Board of Equalization of the State of California be and appear before the undersigned Referee in Bankruptcy in his courtroom, 211 Katz Building, San Bernardino, California, on the 5th day of April, 1955, at the hour of 9:30 a.m. thereof, and then and there show cause, if any they may have, why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett; and

It Is Further Ordered that a temporary restraining order issue on Earl Bennett and on the Board of Equalization of the State of California forbidding and restraining the transfer of the on-sale [28] liquor license until a final order is entered in the within proceedings; and

It Is Further Ordered that service of the petition and order be made upon the respondents, and each of them, by placing a copy of the within petition and order in an envelope and depositing same in a United States Post Office, postage prepaid, as follows:

Earl Bennett,
155 South Greenleaf Street,
Whittier, California.

Mr. Russell Munroe,
Director of Alcoholic Beverage Control,
Sacramento, California.

Mr. Charles Shorey,
Calif. State Board of Equalization,
San Bernardino, California.

Dated: March 25, 1955.

/s/ N. C. PETERS,
Referee in Bankruptcy.

[Endorsed]: Filed August 19, 1955. [29]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable N. C. Peters, Referee in Bankruptcy:

Petitioner Earl Bennett, an interested party herein, petitions for a review of the Order made and entered herein on July 21, 1955, entitled "Findings of Fact, Conclusions of Law and Order Based Thereon." Petitioner respectfully shows:

I.

Petitioner Earl Bennett is a stockholder of the above-named bankrupt corporation and is an interested party in and to the within proceeding under the facts herein stated. The subject of the instant proceeding presents for adjudication the problem of whether title to the "on-sale liquor license" herein involved was passed to and became an asset of the bankrupt corporation under the terms and provisions of the revocable and unexercised option

attached to the Referee's Findings as Exhibit "A" wherein petitioner and Isabelle L. Bennett, husband and wife, granted to the above-named bankrupt the right to purchase the aforesaid liquor license on or before October 15, 1956, upon payment to the Bennetts of the sum of \$18,000.00. [30]

II.

On March 24, 1955, the trustee herein filed his petition for an order to show cause on petitioner, Earl Bennett, and the California State Board of Equalization (amended at the hearing thereof to read "Department of Alcoholic Beverage Control of the State of California") requiring them to show cause before the Referee, if any they have, why said "on-sale liquor license" should not be determined to be an asset of the bankruptcy estate.

III.

Said petition in effect contained the following allegations:

(a) That said liquor license originally stood in the name of Niel McDermott.

(b) That thereafter petitioner Earl Bennett paid McDermott therefor the sum of \$18,000.00 by his personal check.

(c) That the paper title to said liquor license was thereupon placed in the bankrupt corporation and the same still stood in the name of the bankrupt at the institution of the within bankruptcy.

(d) That on January 13, 1955, petitioner made an application to the Department of Alcoholic Bev-

erage Control of the State of California for the transfer of said liquor license to the petitioner.

(e) That as a matter of law the aforesaid liquor license was the property of the bankrupt and the petitioner's application for its transfer to him was without consideration and a fraud upon the creditors of the bankrupt estate for the sole reason that the license "is being accepted without consideration."

IV.

Based on the aforesaid allegations in the petition, an order to show cause was issued by the Referee on March 25, 1955, ordering the petitioner and the California Department of Alcoholic [31] Beverage Control to appear before the Referee and show cause on the 5th day of April, 1955 "why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett."

V.

The hearing on said petition and order to show cause took place on April 5, 1955, at which the following was established by undisputed testimony:

1. The liquor license was previously owned by one Neil McDermott, and petitioner, Earl Bennett, subsequently purchased it from McDermott and paid him therefor the sum of \$18,000.00 with his individual funds.

2. On September 3, 1954, a written option was executed by petitioner and his wife, as optionors, and the bankrupt corporation as optionee, under the terms of which the bankrupt was granted the right to purchase the liquor license at any time on or before October 15, 1956, by paying to the Bennetts the sum of \$18,000.00, same being the identical amount petitioner individually had paid to McDermott. Said option also provided that the bankrupt shall pay to the Bennetts \$350.00 per month "so long as the corporation retains said liquor license." No consideration was paid by the corporation for said option. Said option contained the following express stipulation:

"Proctor's Monte Cristo, a corporation, further promises and agrees that in the event it has not exercised the option to purchase liquor license, that it will on or before the 15th day of October, 1956, cause the said liquor license to be transferred to the said Bennetts or their assigns."

The option was accompanied by a guarantee signed by Thomas [32] L. Proctor and his wife, Shirley Mae Proctor, (who were the president and secretary of the bankrupt corporation) wherein they guaranteed the performance of the option by the bankrupt on conditions

"that in the event the said Proctor's Monte Cristo, a corporation, does not make any of the payments to the said Bennetts as hereinabove provided for or does not retransfer the said

liquor license as hereinabove provided for, the undersigned personally promise to the said Bennetts that they will make such payments, or in the event the said Bennetts exercise the option requiring the return of the said liquor license, the said Proctors will either cause said liquor license to be returned to the said Bennetts, or will personally pay to the said Bennetts the sum of \$18,000.00."

3. Pursuant to the terms of the option, an escrow was opened between McDermott and the bankrupt for placing the license in the name of the bankrupt upon payment of the sum of \$18,000.00. As noted above, the consideration to McDermott was paid by the petitioner, and that the bankrupt never paid any consideration for the license.

4. The option was not exercised by the bankrupt, and the bankrupt did not pay any of the monthly payments for the use of the license or any part of the \$18,000.00.

5. Due to the fact that the option was not exercised or complied with, arrangement was made, prior to the bankruptcy, for the retransfer of the license to the petitioner "as originally intended when it was transferred to the corporation." There is no evidence in the record that the retransfer would not have been approved by the Department of Liquor Beverage.

6. There is no testimony in the record that there

were any [33] creditors at the time when the license was placed in the name of the bankrupt under the terms of the option. Nor is there any testimony of any acts of reliance by the creditors on the paper title of the license in the bankrupt.

As above noted, the trustee's petition on which the order to show cause was based, rests on the single premise that the retransfer of the license by the bankrupt to the petitioner was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the option.

VI.

Based on the factual record, the Referee made the conclusion of law that the license was and is the property of the bankrupt estate and that the option was "illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California, and as an illegal contract is not binding upon this bankrupt estate."

VII.

Based on said conclusion of law, an order was entered by the Referee on July 21, 1955, that the on-sale liquor license "is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein."

VIII.

Petitioner alleges that said conclusion of law and order are erroneous for all and each of the following reasons:

1. An agreement to transfer a license is valid under the California law. Therefore, the option was not illegal or void.

2. Assuming (but not conceding) that the option was in contravention of the regulations of the California Department of [34] Alcoholic Beverage, such does not render the option void or illegal, since non-compliance with the regulations of the Department of Alcoholic Beverage is a matter that can be adjusted between the petitioner and the Department. It does not affect petitioner's property right in the license.

3. Assuming again that the option was void, the ownership of the license was at all times in the petitioner, who was the rightful owner thereof, and the apparent legal title thereto was held by the bankrupt in trust for the petitioner under the well settled law that under no circumstances could the bankrupt claim an interest in the license adverse to the petitioner.

4. There is no testimony in the record that there were any creditors at the time when the license was placed in the name of the bankrupt under the terms of the option. Nor is there any testimony of any acts of reliance by the creditors on the paper title of the license in the bankrupt.

As above noted, the trustee's petition on which the order to show cause was based, rests on the single premise that the retransfer of the license by the bankrupt to the petitioner was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the option.

5. Conclusions of the Honorable Referee are contrary to the law.

Wherefore, petitioner, feeling aggrieved because of the order hereinabove referred to, prays that the same be reviewed as provided by Section 39-c of the Bankruptcy Act; that said order be reversed; and that the Honorable N. C. Peters, Referee in Bankruptcy, prepare his Certificate on Review and attach thereto the following:

1. Transcript of reporter of all the evidence taken upon [35] the hearing on the petition hereinabove referred to.

2. Order of adjudication.

3. Petition (referred to in Paragraph II hereof) and order to show cause (referred to in Paragraph IV hereof) upon which this review is based.

4. Findings of fact, conclusions of law and order herein reviewed.

5. The following exhibits: The option, a copy of which is attached to the Findings of Fact, as Exhibit "A," and the resolution adopted by the Board

of Directors of the bankrupt corporation, authorizing the execution of said option.

6. Petition for review.

/s/ EARL BENNETT,
Petitioner.

MILLER, VANDEGRIFT, MIDDLETON AND
DARWIN H. WOLFORD AND ERNEST R.
UTLEY,

By /s/ ERNEST R. UTLEY.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 19, 1955. [36]

[Title of District Court and Cause.]

CERTIFICATE OF REVIEW

To the Honorable Leon R. Yankwich, District
Judge:

I, N. C. Peters, Referee in Bankruptcy in this proceeding, hereby certify that in the course of such proceeding an Order and Decision was made, a copy of which is annexed to the petition hereinafter referred to was made and entered on the 21st day of July, 1955.

That on the 1st day of August, 1955, Petitioner Earl Bennett feeling aggrieved thereat, filed a petition for review, which was granted.

That the error complained of by the petitioner being one in number is set forth in full in his petition.

That the summary of the evidence on which order was based is as follows:

That sometime in the month of October, 1954, Neil McDermott entered into an escrow with the bankrupt corporation for and in consideration of the payment of \$18,000.00. That said \$18,000.00 was paid by Earl Bennett in the escrow and the license was forthwith transferred to the bankrupt corporation. That the said license has and at all times, and does now stand in the name of the bankrupt corporation. That on or about January [38] 13, 1955, Earl Bennett made application to the California State Board of Equalization and gave notice of intention to transfer license to Earl Bennett without consideration; that the transfer of the liquor license to said Bennett without consideration would constitute a fraud upon the creditors of this bankrupt estate inasmuch as the same is being accepted without consideration.

I hand up herewith, for the information of the Judge, the following papers:

1. The record book or minutes of this proceeding showing.
2. The Petition on which this certificate is granted.

3. All other papers filed with me herein which are pertinent to this review.

/s/ N. C. PETERS,
Referee.

[Endorsed]: Filed August 22, 1955. [39]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW OF
REFEREE'S ORDER FIXING TITLE TO
ON-SALE LIQUOR LICENSE

This matter having come on for hearing on the petition for review of Earl Bennett, on the 9th day of January, 1956, at the hour of 9:30 a.m. thereof; and the petitioner, Earl Bennett having appeared by and been represented through his counsel, Miller, Vandegrift & Middleton by Ernest R. Utley, and the respondent, E. W. Bailly, trustee in bankruptcy for Proctor's Monte Cristo, Inc., a corporation, bankrupt, having appeared by and been represented through his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell; and briefs having been submitted, and the matter having been considered,

Now, Therefore,

It Is Ordered, that the Referee's Order fixing and determining title to the on-sale liquor license made and entered on July 21, 1955, be and it hereby is affirmed, and the Findings of Fact and Con-

clusions of Law on which the said order was [40]
made be and the same hereby are adopted.

Dated: March 26, 1956.

/s/ WM. M. BYRNE,
U. S. District Court Judge.

Approved as to Form:

MILLER, VANDEGRIFT &
MIDDLETON,

By /s/ ERNEST R. UTLEY,
Attorneys for Petitioner.

[Endorsed]: Filed March 26, 1956.

Docketed and entered March 27, 1956. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Earl Bennett, the respondent in the within proceedings, and an interested party therein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, made and entered on March 27, 1956, adopting and affirming the order of the Referee made and entered in this proceedings on July 21, 1955, and adopting the Findings of Fact and Conclusions of Law made by the Referree, and denying the petition of Earl

Bennett for a review of the aforesaid order of this Referee.

Dated this 13th day of April, 1956.

MILLER, VANDEGRIFT &
MIDDLETON,

DARWIN H. WOLFORD,

ERNEST R. UTLEY,

By /s/ ERNEST R. UTLEY,
Attorney for Appellant.

[Endorsed]: Filed April 26, 1956. [42]

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 65347-WB

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Cor-
poration,

Bankrupt.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

ORDER TO SHOW CAUSE

Tuesday, April 5, 1955—10:00 A.M.

Before: Honorable N. C. Peters,
Referee in Bankruptcy.

Appearances:

For the Trustee:

CRAIG, WELLER & LAUGHARN, By
CHRISTOPHER E. H. McDONNELL,
Of Counsel.

For Certain Creditors:

MILLER, VANDEGRIFT &
MIDDLETON, By
THOMAS J. MIDDLETON,
OSCAR M. ADAMS.

The Referee: We will take up the hearing now in this Monte Cristo corporation on these orders to show cause.

Mr. McDonnell: Well, let's begin with the Carbonic Equipment Company matter and the American National Bank.

The Referee: Is there anyone here representing those parties?

Mr. Butz: I am Vernon, Butz, B-u-t-z, Carbonic Equipment Company.

Mr. Adams: I am Oscar M. Adams, Base Line Branch, American National Bank.

The Referee: You are both attorneys?

Mr. Butz: No.

Mr. Adams: No, sir.

The Referee: Neither one are attorneys.

Mr. McDonnell: Before we begin this matter, I brought Mr. Aasness here with me because of the gravity of this and the other order to show cause.

I thought we ought to have an official record. Would your Honor please swear Mr. Aasness?

(Thereupon, the reporter was sworn.)

Mr. McDonnell: Would your Honor swear Mr. Proctor in this proceeding, please?

The Referee: He has been sworn before.

Mr. McDonnell: Yes. Since this is a separate matter, I thought it would be better to have him sworn again. [3*]

The Referee: All right.

THOMAS PROCTOR

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell:

Q. Mr. Proctor, are you the president of Proctor's Monte Cristo, Inc.? A. I was, yes.

Q. Has there been a new president since bankruptcy? A. No.

Q. And were you president on March 4, 1955? That was when the bankruptcy was commenced.

A. Yes, I was.

Q. You closed the business sometime during the month of January, did you not?

A. That's right.

Q. Do you know what that date was?

A. 12th or 13th, if I remember exactly.

Q. About the 12th or 13th, you say?

A. That's right.

(Testimony of Thomas Proctor.)

Q. Now, you didn't operate the business after that time? A. No, sir.

Q. I want to call your attention to a sum [4] of approximately \$531, which is in the American National Bank, I think the Base Line Branch. Do you know about that sum of money, Mr. Proctor?

A. Yes, I do.

Q. Tell me how it came, first of all, to be in the American National Bank?

A. I deposited it like I told you in previous interviews here, that it was put in there to pay the taxes and licensee for the liquor license.

Q. Was it deposited in the name of the corporation? A. In my name.

Q. Whose money was it, yours or the corporations? A. The corporation's money.

Q. It came from the corporation business, is that right?

A. It came from the business itself.

Q. And you make no claim to it personally?

A. That's correct.

Q. Now, after you deposited the \$531 in that account in your name, what happened?

A. Well, there was more put in there but that was the amount that was attached, or approximately the amount that was attached.

Q. I see. Do you know who the attaching creditors were? [5]

A. Carbonic Equipment Company and W. C. Brassfield and the American National Bank.

Q. W. C. Brassfield?

(Testimony of Thomas Proctor.)

A. That is correct.

Q. And Carbonic Equipment Company. Were they the attaching creditors?

A. I guess they are, or the American National Bank. I don't know which.

Q. Attached these——

A. Took the money out.

Q. I see. And about when did that occur, do you know?

A. No, I don't. I got a letter today with that information, but I don't remember the date at all.

Q. Perhaps the American National Bank could give the exact date.

Mr. Adams: Yes, attached the 5th day of January, 1955.

The Referee: Attached by whom?

Mr. Adams: The attachment is in the name of W. C. Brassfield.

Q. (By Mr. McDonnell): Now, when you commenced these bankruptcy proceedings on the 4th of March of this year, Mr. Proctor, what was the general financial condition of the company, good or bad? A. Well, it was very bad.

Q. Would you say that, at that time, it owned more money [6] than it had in assets?

A. Yes, sir, it did.

Q. Did it owe more money than it had in assets on January 5, 1955? Eight days before you closed it.

A. Well, I wouldn't know the exact amount on that. I imagine it would probably be approximately

(Testimony of Thomas Proctor.)

the same. I mean we were paying it out as fast as it came in.

Q. In other words, you were in about the same position that you were on the 4th of March?

A. That is correct.

Q. And that would be that you owed more than you had in assets? A. In assets, yes.

Mr. McDonnell: That is all the questions I have of Mr. Proctor. Do the other gentlemen wish to cross-examine?

The Referee: Do you want to ask him any questions?

(Witness excused.)

Mr. McDonnell: I would like to have the man from the American National Bank sworn so I can put in some documentary evidence.

OSCAR M. ADAMS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell: [7]

Q. You are Oscar M. Adams? You work for the American National Bank, Base Line Branch?

A. American National Bank, Base Line Branch.

Q. Were you so employed on January 5, 1955?

A. I was, sir.

Q. What, in general, is your capacity?

A. I am assistant branch manager.

Q. Do you know about the attachment in this

(Testimony of Oscar M. Adams.)

matter? A. Yes, sir.

Q. How much was attached on January 5, 1955?

A. The balance of the account at the time was \$570.26. We credited to our attached account \$300.33, the remainder, \$204.93, the conditional sales contract at that time was delinquent in the amount of \$204.93.

Q. Now, let me get this straight. When the attachment was run, you made a return, I presume, that you were indebted for \$365.33, is that correct?

A. That is correct, sir. That, however, has since been altered.

Q. In what fashion?

A. The attachment was received on the 5th day of January, 1955. On the 4th day of January, 1955, a check in the amount of \$117.88, drawn by Thomas Proctor, was cashed at our main office.

Q. Yes. [8]

A. By the time the check reached our branch to be paid, the account, of course, had been attached, the account closed, and the proceeds credited to the attached account awaiting, of course, further instructions. Inasmuch as the check had been prior to the attachment, we deducted the amount of \$117.88 from the \$365.33. We now hold \$247.45.

Q. Now, I am going to have to put this together so I understand it. You say that you cashed a cash check for \$117 on the 4th, or the 3rd?

A. The 4th day of January.

Q. The 4th day of January. That was not cashed at the same branch? A. No, sir.

(Testimony of Oscar M. Adams.)

Q. And when did that check reach your Base Line Branch?

A. It reached us on the 6th day of January.

Q. I see. After you had made the credit to the bank and reported that you were indebted in the sum of \$365.33?

A. That is correct, sir.

Q. And, now, with the conditional sales contract, when did you make this credit of \$204.93?

A. The 5th day of January, 1955.

Q. Before you transferred to the attachment account?

A. That is correct, sir.

Q. And that was on the delinquent conditional sales contract payment? [9]

A. That is correct.

Q. Who held the contract at that time?

A. The American National Bank.

Q. I see. Was it a with-recourse contract?

A. It was, sir.

Q. I see. And have you since returned it to the Carbonic Equipment Company?

A. We have not. We still hold it in a delinquent condition.

Mr. McDonnell: I see. That is all the questions I have. In fact, that is the trustee's case, Judge.

The Referee: All right.

Mr. McDonnell: Here is the trustee's position briefly: Here is an attachment run within four months of bankruptcy. Mr. Proctor testifies to insolvency, which I think would avoid the attachment.

That leaves us the question, in my opinion, of how much money are we entitled to. The original attachment was \$365.33, and apparently a return was made in that amount. I think that that affixed the attachment lien to that amount and I don't believe this banker's lien would supersede the attachment lien.

I believe that we are entitled to \$365.33, which was the original sum attached in the sum on which the return was made, I presume.

The Referee: What was that amount? [10]

Mr. McDonnell: \$365.33.

In other words, I don't believe the bank is entitled to it.

The Referee: \$365.33?

Mr. McDonnell: That's right.

That is the trustee's position.

Mr. Adams: Might I make a statement?

The Referee: Surely.

Mr. Adams: I would feel that, technically, a check is considered paid when the cash is advanced in the window, at the window, to the payee of the check, regardless of what branch, it is considered paid. The cash is advanced. Consequently, we were in error in our original return, which was the circumstance which we were not aware of until such time as the check reached the bank on which it was drawn.

I would hold that the correct sum would be \$247.45, inasmuch as the check was actually paid at the time he was at the window and not at any later time.

The Referee: What if it had been cashed by an outsider?

Mr. Adams: If it would have been cashed by an outsider, we would have had recourse against the endorsee.

The Referee: Wouldn't the same rule apply to the bank? One branch could have phoned the other branch and found out. They paid it without knowing it had been attached. If it had been cashed by an outsider, he would still be subject to the [11] attachment.

Mr. Adams: My point is it was cashed one day before the attachment was run. The fact that it merely had not cleared the bank and been paid against the account doesn't affect the fact that the check was actually paid and reduced the balance by that much. The check was considered paid on January 4; the attachment was run on January 5th.

Mr. McDonnell: I would prefer to analyze the problem this way, from a lien standpoint. As your Honor knows, the law is well-settled that the debtor creditor relationship between a bank and depositors. Now, let's analyze the situation. On the 4th, when the check was cashed, Mr. Proctor brought in a slip of paper which was an order on the bank to pay from his account.

Mr. Adams: Mr. Proctor didn't bring in the check.

Mr. McDonnell: The check was cashed in some fashion. I don't know how. At that moment, the situation was that Mr. Proctor owed the bank, from

his account, the sum, \$117. At the same time, of course, the bank in the other branch had an indebtedness to Mr. Proctor.

Now, before the banker's lien was attached, which is the only right the bank would have had to go in and take the money out of the other account, before that lien attached, they made a return on a marshal's attachment, the return being that they owed Mr. Proctor a net sum of \$365.33. Now, [12] the minute they made that return and transferred the money from the general account to the attachment account, they placed it in a special account to which the bank had no right of recourse under its banker's lien and, therefore, the attachment lien would be prior. This trustee, under Section—I think—70(c), that attachment—in other words, he can take the attaching creditor's rights and therefore acquires the right of lien against that fund transferred into the trust account, is what it is essentially, and, for that reason, the bank has no right to exercise its banker's lien and remove from that account which is no longer the general account of Mr. Proctor, the sum of \$117.

Now, that is the trustee's position in a nut shell.

Mr. Adams: The bank's position to counteract that, sir, would be, in effect, that the account was reduced by \$117.88 on the 4th day of January. Our books showed a figure which was in error and, because of showing that in error, we transferred the wrong amount to the attached account. Actually, the check was paid, considered to be paid, on the 4th day of January, one day previous to the attachment.

We were in error in transferring \$365.33 to the attached account.

Mr. McDonnell: But once the bank had made that error and had credited the sum into the new account, the lien of the attaching creditor attached to that money and that right [13] passes to the trustee.

The Referee: The trustee stands in this as a creditor with a lien on that fund. However. I will give you a week in which to file a brief to establish your contention. I think his contention is correct, but I will give you a week in which to file a brief.

Mr. Adams: Very well.

Mr. McDonnell: Will you take the matter under submission, then, Judge, pending the filing of a brief? I presume that, if the bank does file a brief, I have the right to file within seven days in reply. Is that satisfactory?

The Referee: They file their brief in seven days and, if you want, then you can reply to it in three days, so it wouldn't have to be continued more than two weeks.

Mr. McDonnell: All right. If I am going to reply, I will reply in time. If I am not going to reply, I will notify you and the bank immediately.

The Referee: Yes. We will continue that incident for two weeks.

Mr. McDonnell: Why don't you just take it under submission?

The Referee: All right. It will be submitted, then, in briefs.

Any other issues under this order to show cause?

Mr. McDonnell: I don't believe so. I don't [14] think so. Is there any question in your mind on this attachment so far as attaching creditor is a void attachment, Judge?

The Referee: Of course, the statute makes it void when the attachment be levied while the debtor was insolvent within four months. The knowledge of his condition is not essential; it is an attachment.

Mr. McDonnell: I would like to say that apparently Carbonic Equipment Company has been joined in this matter through error. Mr. Proctor informed the trustee they were one of the attaching parties. I perceive they were not. Actually, Carbonic is not a party to this proceeding. Let me ask the gentleman: You didn't run an attachment?

Mr. Butz: No.

Mr. McDonnell: There has been no attachment from Carbonic Equipment Company on the money.

I will prepare a separate order taking the Carbonic Equipment Company out of the order to show cause. You were here in error, and I will recite it so and serve it.

The Referee: Any other questions?

Mr. Adams: I would like to ask one other question. We still hold the conditional sales contract in a delinquent condition. In order that we might salvage the unpaid balance, we would like permission to remove the equipment from the premises, 1996 Highland Avenue, so we can clear our delinquent contract. [15]

The Referee: Now, a conditional sales contract from a legal standpoint is the same as a chattel

mortgage. That is, the trustee has the same rights as if it were a chattel mortgage.

Mr. McDonnell: Maybe I can help the Judge. We have surveyed the premises. We are convinced there is no equity. If the American National Bank wants to remove all of the property, it will be perfectly satisfactory to do that at once. I know you want to get the property out.

The Referee: Well, the trustee has 60 days in which to assume future contracts. He seems to have waived his right to do so. If 60 days hasn't elapsed, well, then, you would have to get an order authorizing the abandonment of his property.

Mr. McDonnell: If the American National Bank will give me a list of the equipment, I will prepare such an order. We have no desire to assume the contract or hold them from the property.

The Referee: All right.

Mr. McDonnell: Now, can we go ahead on the Bennett order to show cause, Judge?

The Referee: Yes.

Mr. McDonnell: This matter is ready for the trustee.

Mr. Middleton: My name is Thomas J. Middleton. I am appearing for Mr. Bennett. [16]

The Referee: Do you have Mr. Bennett in person?

Mr. Middleton: Yes.

The Referee: Who else appears?

Mr. Shorey: Charles Shorey.

Mr. McDonnell: The State of California is also present, your Honor. Your name is Shorey, and you appear for the State Board of Equalization?

Mr. Shorey: Charles Shorey, S-h-o-r-e-y.

The Referee: Now, what is the Bureau that you appear for?

Mr. Shorey: The Department of Alcoholic Beverage Control.

The Referee: Do you want to amend your order?

Mr. McDonnell: I will amend the order, and I will recite in that that Department of Alcoholic Beverage Control.

Mr. Middleton: Correct. That was changed over on January 1st from the Board of Equalization.

Mr. McDonnell: Are we ready to go?

The Referee: Yes.

Mr. McDonnell: I would like to have Mr. Proctor sworn again, since this is a separate proceeding.

THOMAS PROCTOR

was called as a witness and, having been first duly sworn, was examined and testified as follows: [17]

Examination

By Mr. McDonnell:

Q. Your name is Thomas Proctor, and you are the president of the bankrupt corporation, is that correct? A. Correct.

Q. And have you also been the president ever since its formation? A. Right.

Q. I see. Now, I want to interrogate you about a liquor license. What sort of an operation was Proctor's Monte Cristo? Was it a dining room and cocktail lounge?

A. It was a dining room and cocktail lounge.

(Testimony of Thomas Proctor.)

Q. And had it been operated as a dining room and cocktail lounge previous to the time you came into the picture? A. It had been.

Q. Do you know by whom?

A. Neil McDermott had the building out there before we did, previous to that.

Q. Just the one right before you. You say his name is Neil McDermott?

A. That's right?

Q. How do you spell that?

A. M-c-D-e-r-m-o-t-t.

Q. All right. Now, do you have a liquor license in your own name for the right to operate Proctor's Monte Cristo?

A. I have never had a liquor license. [18]

Q. Did Proctor's Monte Cristo obtain a liquor license? A. It did.

Q. Will you tell us how?

A. Mr. Bennett obtained the license and he obtained it from Neil McDermott.

Q. Now, in whose name did the liquor license stand?

A. Well, at the time it was bought, in Neil McDermott's own name, I believe, and then, of course, when it was transferred over, it had to be in the name of the corporation.

Q. Did you at all times understand that it had to be in the name of the corporation and couldn't be in Mr. Bennett's name?

A. That is correct.

Q. I see. And do you know whether or not the

(Testimony of Thomas Proctor.)

license was transferred direct from Mr. McDermott to the corporation, or whether it was transferred to Mr. Bennett and then to the corporation?

A. That I don't know. You would have to ask him about it.

Q. You don't know about that? A. No.

Q. Do you know what happened with the liquor license when the business closed up in the month of January?

A. Mr. Bennett had the liquor license.

Q. Just tell me what happened. You got ready to close [19] the business and then what happened? Did you and Mr. Bennett discuss the matter?

A. Oh, yes, it was thoroughly discussed. That was when we decided to close the business. We had a meeting of all the directors, all of us, and we closed the business down at that time.

Q. And did Mr. Bennett and you discuss the situation of the liquor license at that time when you were closing down?

A. The liquor license had been discussed previous to that, and that time also, and the fact that the business didn't go like it should and as it should be, the liquor license went back to him.

Q. I see. And, Mr. Proctor, you were having trouble with your creditors in January, weren't you? A. Yes, sir.

Q. They were really after you. Now, the corporation entered into some sort of an agreement with Mr. Bennett, did it not, concerning the liquor license? A. That is correct.

(Testimony of Thomas Proctor.)

Q. There was a board of directors meeting concerning that, is that correct?

A. That is correct.

Q. Let me see if I can find the minutes. Now, I am going to lay before you—I will let counsel see this—I might say, I didn't mean to restrict counsel from the whole [20] set of minutes. That was the pertinent part.

Mr. Middleton: What portion are you referring to?

Mr. McDonnell: I am going to refer to that portion of the meeting which discusses the liquor license. There were a number of things that took place at the same meeting. I just want to discuss that. That is, the liquor license.

While you have the book, do you have the original of this agreement?

Mr. Middleton: Never seen any part of it.

Q. (By Mr. McDonnell): I lay before you a book, bound book, Mr. Proctor, and I call your attention to the fourth page of the minutes for the meeting of September 3rd, 1954. Were you at that meeting in September, 1954, Mr. Proctor?

A. Yes.

Q. And, now, I want to call your attention to this portion of those minutes: "Whereas Earl Bennett and Isabelle Bennett have acquired a general on-sale liquor license and have paid the sum of \$18,000 for same * * *"

Well, let me interrupt right there at the comma. I understood you to say before, Mr. Proctor, that

(Testimony of Thomas Proctor.)

the license had been obtained or gotten directly from Mr. McDermott to the corporation, or perhaps I didn't understand you correctly.

A. No. Just a minute ago, I said I didn't know what happened.

Q. All right. Now, beginning after the [21] comma: “* * * and proposed to take said liquor license in the name of the corporation upon the corporation's promise to pay them the sum of \$350 a month during the time that said corporation uses said liquor license, that the corporation having the option to buy the liquor license at any time on or before October 15, 1956, and that a copy of the proposed agreement between Earl Bennett and Isabelle Bennett and the said corporation is attached hereto and marked Exhibit C, and whereas it is deemed to be in the best interests of this corporation that they accept said offer for the reason that it has been impossible to acquire a general on-sale liquor license in any other way and all the parties interested in this corporation deem such liquor license to be necessary; now, therefore, be it resolved to the president and secretary of this corporation be, and they are hereby authorized and directed to execute on behalf of this corporation the agreement re liquor license, wherefore the general on-sale liquor license is transferred to said corporation upon the said corporation paying to Earl Bennett and Isabelle Bennett the sum of \$350 per month during the time that said corporation uses said on-sale liquor license; the corporation having the option to

(Testimony of Thomas Proctor.)

pay for said liquor license at any time on or before October 15, 1956. Be it further resolved to the president and the secretary of this corporation be and they are hereby authorized and directed to apply to the State Board of Equalization for [22] the transfer of the said on-sale liquor license."

Do you recall that transaction at the meeting, Mr. Proctor, as recited? A. Yes.

Q. And at that time did you vote and authorize it as the minutes recite? A. That's right.

Q. Now, was a contract drawn up before that or after that meeting concerning this liquor license?

A. The contract was part of it.

Q. Was it present at the time of the meeting?

A. That is correct.

Q. The meeting was held in Swing's office, is that right? A. That is correct.

Q. He is an attorney at law in San Bernardino?

A. That's right.

Q. Do you know whether the contract was drawn in his office or not?

A. He drew the contract.

Q. And this arrangement was made with legal counsel? A. That is correct.

Q. I see. Now, in the same minute book, I find a copy of an agreement re liquor license. Do you recognize his signature thereon? [23]

A. Yes.

Q. One of them yours and one of them your wife's?

(Testimony of Thomas Proctor.)

A. My wife's signature isn't on there. It is down here, but not up there.

Q. You mean it is on the guarantee portion? You and your wife guaranteed personally the payments? A. That's right.

Q. I see. Now, it says "Earl Bennett." Is that his signature? A. Yes.

Q. Do you recognize his wife's signature?

A. Yes, I do. Isabelle.

Q. Isabelle Bennett.

Mr. McDonnell: Counsel, do you have the original of this agreement?

Mr. Middleton: Never seen it.

Mr. McDonnell: We do not have the original anywhere, except this, which is apparently a duplicate signed and executed in full form, and I would like to offer this agreement at this time as trustee's first in order.

Now, I don't like to tear it out of the minute book, so I am going to offer it in the minute book and ask counsel if he will agree to let me have photostatic copies made and substitute them.

Mr. Middleton: I would object to that until such time as [24] it is determined what happened to the original.

Q. (By Mr. McDonnell): Mr. Proctor, do you know where the original is?

A. The original copy of this, you mean?

Q. Yes. A. I don't know.

Q. Did you ever see another copy other than this? A. Do you have the original, Earl?

(Testimony of Thomas Proctor.)

Q. Did you ever see any copy?

A. There was quite a few copies that were signed.

Q. And were they all signed equally?

A. They were.

Mr. McDonnell: I will offer this as a duplicate original.

The Referee: All right.

(Thereupon, the document above referred to was received in evidence as Trustee's Exhibit No. 1.)

Q. (By Mr. McDonnell): Did you, as an officer of the corporation, go into an escrow to transfer this license to Mr. Bennett sometime in January?

A. Yes, it was put in escrow.

Q. Was the corporation to receive any consideration for the transfer of the license at that time?

A. None whatsoever.

Mr. McDonnell: I think that is all the questions I have of Mr. Proctor at the moment. [25]

Examination

By Mr. Middleton:

Q. Mr. Proctor, the corporation never paid anything for a license that you referred to, the liquor license?

A. As buying it, no, they did not.

Q. Did you know at all times, as president of the corporation, that the license was being used by the corporation as a matter of convenience?

(Testimony of Thomas Proctor.)

A. That is correct.

Q. And this was a lease arrangement whereby the corporation used the license but paid no consideration of any kind for it, is that correct?

A. Well, the corporation used the license, but it paid \$350.

Q. For the use of the license?

A. For the use of the license, yes.

Q. There was an option to purchase the license?

A. That is correct.

Q. Was that option ever exercised?

A. No. Never got any money.

Q. And the corporation, as you have already testified, never paid anything toward the purchase price?

A. That is correct.

Mr. Middleton: That is all.

Mr. McDonnell: I should like to call Mr. Bennett under [26] Section 21(j) of the Bankruptcy Act.

EARL BENNETT

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell:

Q. Your name is Earl Bennett, is that correct?

A. Yes, sir.

Q. On the 4th of March, 1955, Mr. Bennett, were you an officer of the bankrupt corporation?

A. Yes, sir.

Q. What officer were you? A. Secretary.

(Testimony of Earl Bennett.)

Q. Were you a director of the bankrupt corporation?
A. Yes, sir.

Q. And were you a stockholder of the bankrupt corporation on that date?
A. Yes, sir.

Q. Had you been at all times after, say, the 1st of January, 1955, an officer-director and stockholder?
A. Yes, sir.

Q. Now, tell us: You have heard the testimony about the liquor license. Tell us how you came to purchase the liquor license, Mr. Bennett.

A. Well, do you want me to give a resume? [27]

Q. Yes. Just tell me how the liquor license transaction went. I want your version of the facts.

A. Well, it is a matter of record, as I gave it before, I believe.

Q. That doesn't apply in this hearing.

A. I bought the license from Neil McDermott and transferred it to the corporation, paid \$18,000 for it.

Q. Now, let's see. When you say you bought the license, do you mean you took it in your own name?

A. No, I paid for it.

Q. I want to get the details of the transaction. When you arranged for the purchase of this license with McDermott, was an escrow opened?

A. Yes.

Q. And who was the escrow between, do you know? Between Neil McDermott—and was it being transferred direct to the corporation?

A. The corporation.

Q. You were not a part to the escrow, is that

(Testimony of Earl Bennett.)

correct? That is, not one of the formal escrow parties, buyer-seller? A. Not of record.

Q. I see; now in the escrow, did you put some money in? A. Yes.

Q. How much did you deposit in the [28] escrow? A. In the escrow, \$17,500.

Q. Had you paid some money outside of escrow?

A. On the day previous, I had given Mr. McDermott a check for \$500.

Q. I see. So you gave him \$500 outside and you put \$17,500 in the escrow?

A. That's right.

Q. It was your personal check, was it, or did you do it through the corporation?

A. Personal check, each check.

Q. And then Mr. McDermott, he deposited the liquor license in the escrow?

A. That is correct.

Q. The escrow closed, and, to your knowledge, was the license placed in the name of the corporation? A. That's right.

Q. Now, wasn't there some discussion at one time that the license should be taken directly in your name, Mr. Bennett?

A. There may have been some discussion, as there was a great deal of discussion previous to obtaining a license.

Mr. Middleton: Just a moment. Could we have a little better foundation? When——

Q. (By Mr. McDonnell): Will you tell us when the transaction occurred, Mr. Bennett?

(Testimony of Earl Bennett.)

Mr. Middleton: What are you asking? [29]

Q. (By Mr. McDonnell): Was there a discussion—and I waited for a yes or no answer, counsel. I just wanted to know whether there was a discussion.

A. Yes, there was a discussion.

Q. The answer was, "There was a discussion."

With whom was the discussion?

A. Well, there was a discussion in Mr. Swing's office in the presence of the Proctors and Mr. Swing.

Q. In the presence of whom?

A. The Proctors, Mr. and Mrs. Proctor, and Mr. Swing.

The Referee: And yourself?

The Witness: And myself and Mrs. Bennett.

Q. (By Mr. McDonnell): And when was that, approximately?

A. That was previous to obtaining the license, but I could not say.

Q. Was it before September 3rd, the date of the contract in the minutes?

A. Yes.

Q. About how long before that?

A. It could have been two weeks.

Q. Now, what was the substance of that conversation concerning your taking the liquor license in your own name?

A. Well, the license, as I was informed, had to be in the name of the occupant or the business.

Q. And so you understood then that you couldn't hold [30] it in your name and have a business operated by Proctor's Monte Cristo Corporation, is

(Testimony of Earl Bennett.)

that correct? A. That is correct.

Q. And is that why you permitted the license to be taken in the name of the corporation?

A. That is the only reason.

Q. I see. Now, in January, 1955, Mr. Proctor has testified an escrow was opened to transfer the license back to you. Why was that done at that time?

A. In accordance with our agreements, our previous agreements with the license being entrusted with the corporation.

Q. Well, I am not clear about that. Was there a delinquency in the payments?

A. That and the fact that the corporation had failed and was closing.

Q. And you knew that? A. Yes.

Q. And did you know that it owed debts to its creditors? A. Yes.

Q. And so, then, you suggested, did you, that Mr. Proctor and you go through with the original agreement and transfer the license back to you?

A. I am not positive who suggested it first.

Q. But you discussed it with him? [31]

A. Yes.

Q. The escrow has not closed, has it, Mr. Bennett, to your knowledge?

A. The license has not formally come through yet.

Mr. McDonnell: I see. That is all the questions I have of Mr. Bennett.

(Testimony of Earl Bennett.)

Examination

By Mr. Middleton:

Q. Mr. Bennett, when you permitted the license to be transferred direct from McDermott to the corporation, you merely nominated the corporation as the holder of the license under that agreement that Mr. McDonnell read? A. That's right.

Q. And then the payments became delinquent; the corporation paid no payments on it for the use of the license, you arranged with the other members of the board of directors to transfer the license back to you as originally intended when it was transferred to the corporation? A. Yes, sir.

Mr. Middleton: That is all.

Mr. McDonnell: Before closing the trustees' case, I would like to recall Mr. Proctor for just one question.

The Referee: All right. [32]

THOMAS PROCTOR

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Examination

By Mr. McDonnell:

Q. Mr. Proctor, were there creditors of this corporation in existence at the time of the opening of the escrow to transfer the license to Mr. Bennett? Were there creditors in existence, who were still in

(Testimony of Thomas Proctor.)

existence and were still owed money on March 4, 1955?

A. Now, how do you mean by creditors? From what time, I mean?

Q. What I am trying to find out is if there was a creditor or creditors of this bankrupt who had been owed money from the time of the attempted transfer through the escrow to Mr. Bennett up until the time of bankruptcy. In other words, someone whom you had not paid in that period.

A. Well, you mean from the time we changed the——

The Referee: Were there creditors who were creditors at that time?

The Witness: Yes.

Q. (By Mr. McDonnell): Many of them?

A. Quite a few of them.

Mr. McDonnell: No further questions. That is the case of the trustee. [33]

Mr. Middleton: Nothing further, your Honor.

The Referee: All through?

Mr. McDonnell: That is the evidence, as far as the trustee.

The Referee: All right. Do you want to argue the issues?

Mr. McDonnell: Well, if your Honor wishes to hear argument, the trustee's position is a simple one. The policy of the Alcoholic Beverage Control Act as it is now embodied in the business and professional code has been, and always, as far as I know, always has been and still is, that the license to a liquor, on-

sale liquor license, must stand in the name of the actual operators of the particular bar.

Of course, the public policy behind this is clear. The purpose of the requirement is so that those who are excluded by law from owning licenses can be prevented from owning them secretly. This is no reflection on Mr. Bennett. I don't have that in mind, but that is the policy of the law.

It is enunciated in the code section, Business and Professional Code Section 24040.

Now, if you will examine Business and Professional Code Section 24074, it will be discovered that the manner in transferring liquor licenses in this state requires an escrow and requires a notice so that creditors may be apprised of the transfer of an extremely valuable asset, perhaps in many cases of bars and grills, the only valuable asset to give [34] them a chance to participate in the escrow and in the consideration and they must be paid out of the escrow. In case it would have done the creditors no good, the transaction was to return the license without any consideration to Mr. Bennett.

Now, it is true that Mr. Bennett paid for the liquor license, and that is perhaps an unfortunate thing for Mr. Bennett, but he deliberately permitted the license to be taken in the name of the corporation knowing that he could not hold it and have the corporation operate the bar.

Furthermore, Mr. Bennett knew that the corporation was in, to use the term mildly, a dilapidated financial condition, that was known to him; he was an

officer and director and shareholder and it was deliberately done for that purpose.

Now, as between the bankrupt and Mr. Bennett, the agreement entered into may be—I don't know, I don't think it is in issue—a perfectly valid arrangement. But as between someone who, like the trustee, represents a creditor holding a lien by a legal or equitable proceeding, a most favored creditor, between such an individual and Mr. Bennett, it is quite another problem that is posed.

We have this asset, a valuable asset, and presumptively creditors had relied on that in extending credit, for the existence of such an on-sale liquor license. It was in the name of the corporation. It had never been in Bennett's name. [35] The transaction, even in the escrow, had named only the corporation. So, between the creditors, the representative of the creditors, Mr. Bailey, and Mr. Bennett, I think that the true owner of the license is the corporation and must remain so. Otherwise, a very shameful fraud would be perpetrated upon the creditors who saw a bar and grill, knowing there had to be a liquor license, and suddenly the thing is transferred out without any consideration.

There is one other point I wish to make. The only county case involving the former State Board of Equalization declares a liquor license to be nothing more than a privilege, as nothing more than a privilege. It seems to me that any contention that the license was being held in trust or under any sort of an arrangement where the true owner was Mr. Bennett, though the ostensible owner, no matter what

the law might think, was the corporation. In that sort of a situation, that argument cannot be made because the license is nothing more than a privilege which is what the only county case declares the license to be.

I do not think it is species property which, in this state, can be held in trust by one individual for another. So it seems to me that, in line with what I think is the settled purpose of the law, in line with the protection of the rights of creditors; in view of Mr. Bennett's deliberate placing of the license in the corporation, and also in view of the [36] Orange County case, I think that the license belongs to the corporation free and clear of any claim of Mr. Bennett to it.

Mr. Middleton: Well, I think Mr. McDonnell has answered the questions specifically insofar as Mr. Bennett is concerned. There is the property right in this license. It is a privilege. And that the Orange County case held, whatever it was, this license was loaned to the corporation. It is no more than loaning a settee or a bar. They had no property right in this license. They had an option to purchase it at some future time. They were paying a rental for the use of the license. It might very well be that it is illegal insofar as the State of California is concerned, but it has no bearing whatsoever in a bankruptcy case.

They have no more right in that license—the record, the minutes, the agreement speak for themselves. They had a right, an option to purchase. It

is perfectly above board. They went to an attorney, prepared the matter, took his advice.

As I say, it might very well be in violation of the laws of the State of California but it certainly has no bearing in a bankruptcy case. He paid the full consideration. There is no dispute in that connection. He would be deprived of his property because of a corporation which he was an officer of went bankrupt.

The Referee: Any more evidence?

Mr. McDonnell: Does your Honor wish any more argument? [37]

The Referee: What have you got Mr. Shorey here for?

Mr. McDonnell: Because the State Board of Equalization—pardon me—the Department of Alcoholic Beverage Control still holds the power under the law to transfer or not to transfer the license, Judge.

Your Honor, as I understand, an order to show cause which enjoined the transfer, because I did not want the escrow to close and the problem of jurisdiction to arise, and that is why the Department of Alcoholic Beverage Control was served in this matter, albeit I served them by the wrong name.

The Referee: Well, this case seems to be quite mixed up, and also complicated, and I don't ever want to pass on any points without getting all the evidences and the points and also having all the law there is on the point, so I want both sides to brief your legal points.

You want how much time?

Mr. McDonnell: Well, do you wish me to open, Judge? I think that is proper. I have the burden.

The Referee: All right.

Mr. McDonnell: Just one more matter, Judge. Pending the final determination in this matter, I would like to ask the Court to extend the injunction so that the license, the privilege will not be transferred.

The Referee: All right, the injunction is extended.

(Whereupon, the hearing was concluded.)

State of California,
County of San Bernardino—ss.

I, Herbert W. Aasness, pro tempore reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 38, inclusive, constitute a full, true and correct transcript of proceedings had on Tuesday, April 5, 1955, at 10:00 o'clock a.m. in the matter of Proctor's Monte Cristo, Inc., Bankrupt.

Dated this 13th day of September, 1955.

/s/ HERBERT W. AASNESS,
Pro Tempore Reporter.

[Endorsed]: Filed September 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 44, inclusive, contain the original

Order of Adjudication;

Petition for Order to Show Cause;

Findings of Fact & Conclusions of Law & Order thereon;

Points & Authorities on Order to Show Cause vs. Earl Bennett;

Decision on Claim to Liquor License;

Order to Show Cause;

Petition for Review;

Certificate of Review;

Order on Petition for Review of Referee's Order Fixing Title to On-sale Liquor License;

Notice of Appeal;

Appellant's Designation of Record on Appeal;

which, together with report on proceedings of April 5, 1955, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing transcript amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of said District Court
this 31st day of May, 1956.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15157. United States Court of Appeals for the Ninth Circuit. Earl Bennett, Appellant, vs. E. W. Bailly, Trustee in Bankruptcy of Proctor's Monte Cristo, Inc., a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 7, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15157

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Corpora-
tion,

Bankrupt.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON, UPON APPEAL

Appellant, Earl Bennett, petitioner on review in the District Court from the order of the Referee made and entered July 21, 1955, respectfully submits the following concise statement of points on which appellant intends to rely:

I.

That on or about the 3rd day of September, 1954, appellant, Earl Bennett, became the owner of a certain on-sale liquor license, referred to in these proceedings, through the purchase from Neil McDermott, and by the payment to the said Neil McDermott of the sum of \$18,000.00, the purchase price therefor. That the transfer of said liquor license was handled through an escrow, and appellant nominated the bankrupt corporation herein as the holder of the said liquor license under the terms of an agreement, Exhibit 1 herein.

The bankrupt did not make the rental payments called for under the contract, and failed to exercise

the option mentioned therein and later, and prior to the bankruptcy, attempted to return the license to the name of its true owner, appellant herein. While said transfer was pending before the State Board of Equalization, the within proceeding was filed in the above-entitled case. The entire transaction, and its nature, was fully set forth in the minutes of the corporation and duly authorized by the bankrupt corporation, and there was no attempt at any time to conceal the true ownership of said liquor license, or to conceal the capacity in which the bankrupt corporation held the same.

II.

That under the facts presented, the bankrupt corporation held the license in trust for the appellant, and as the lessee of said license.

III.

There is no allegation in the Petition for Order to Show Cause herein that creditors relied upon the paper title of the license in the bankrupt in extending it credit, nor is there any evidence supporting such a theory.

IV.

The element of estoppel is neither pleaded nor established by the evidence.

V.

That the Court erred in its Finding III to the effect that on September 3, 1954, the bankrupt corporation entered into an escrow agreement with

Niel McDermott for the purchase of an "on-sale" liquor license No. P-11129, for and in consideration of the sum of \$18,000.00. The Court erred in its Conclusions of Law I that "The Court concludes that the On-Sale Liquor License No. P-11129 is the property of this bankrupt estate."

VI.

That the Court erred in its Conclusion of Law II that "The Court concludes that the "Agreement Re Liquor License" is illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California, and as an illegal contract is not binding upon this bankrupt estate."

VII.

That the Court erred in making the following order: "Now, Therefore, It Is Ordered that the Petition of the Trustee herein be, and the same hereby is granted, and it be and it hereby is fixed and determined that On-Sale Liquor License P-11129 is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein."

VIII.

Appellant contends:

(a) That the agreement to transfer the liquor license is valid under the California law, and that neither the lease contract nor the option was illegal or void.

(b) Assuming (but not conceding) that the option was in contravention of the laws of the Department of Alcoholic Beverages does not render the option void or illegal since noncompliance with the regulations of the Department of Alcoholic Beverages is a matter that can be adjusted between the petitioner and the department. It does not affect petitioner's property right in the license.

(c) Assuming again that the option was void, the ownership of the license was at all times in the petitioner, who was the rightful owner thereof, and the appellant's legal title thereto was held by the bankrupt in trust for the petitioner under the well-settled law that under no circumstances could the bankrupt claim an interest in the license adverse to the petitioner.

(d) There is no testimony in the record that there were any creditors at the time when the license was placed in the name of the bankrupt under the terms of the option, nor is there any testimony of any acts of reliance by the creditors on the paper title of the bankrupt in the license.

(e) The trustee's petition on which the order to show cause was based rests on the single premise that the retransfer of the license by the bankrupt to appellant was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the agreement of lease and option.

(f) The conclusions of the Honorable Referee,

and the order of the United States District Court are contrary to the law.

Dated: August 30, 1956.

MILLER & VANDEGRIFT &
MIDDLETON,

DARWIN H. WOLFORD,

ERNEST R. UTLEY,

By /s/ ERNEST R. UTLEY,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 31, 1956.

No. 15158

United States
Court of Appeals
for the Ninth Circuit

See Vol. 2976

WAYNE P. KELLEY, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.
(Pages 1 to 450, inclusive)

Appeal from the United States District Court for the
District of Nevada

FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK

No. 15158

United States
Court of Appeals
for the Ninth Circuit

WAYNE P. KELLEY, Appellant,
vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.
(Pages 1 to 450, inclusive)

Appeal from the United States District Court for the
District of Nevada

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* Page numbers appearing at foot of page of original Transcript of Record.

In The United States District Court For The
District of Nevada, Northern Division

No. 12886

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE P. KELLEY,

Defendant.

CRIMINAL INFORMATION (for violation of
Sec. 145(b), Internal Revenue Code 1939; 26
U.S.C., Sec. 145(b)).

First Count

The United States Attorney charges:

That on or about the 13th day of January, 1950, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$4,163.66 and that the amount of tax due and owing thereon was the sum of \$392.38, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$11,525.66, upon which said net

income there was owing to the United States of America an income tax of \$1,833.22. [2]

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Second Count

The United States Attorney further charges:

That on or about the 13th day of March, 1951, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1950 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$10,125.20 and that the amount of tax due and owing thereon was the sum of \$1,441.78, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$22,576.95, upon which said net income there was owing to the United States of America an income tax of \$4,833.98.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Third Count

The United States Attorney further charges:

That on or about the 15th day of March, 1952, in

the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1951 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$23,085.66 and that the amount of tax [3] due and owing thereon was the sum of \$5,658.40, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$28,102.56, upon which said net income there was owing to the United States of America an income tax of \$7,684.10.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

Fourth Count

The United States Attorney further charges:

That on or about the 16th day of March, 1953, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1952 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada,

a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$38,562.68 and that the amount of tax due and owing thereon was the sum of \$13,967.98, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$45,058.42, upon which said net income there was owing to the United States of America an income tax of \$17,942.22.

(In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).)

FRANKLIN RITTENHOUSE

United States Attorney

/s/ By STANLEY H. BROWN

Assistant U. S. Attorney

Duly verified.

[Endorsed]: Filed Oct. 7, 1955. [4]

[Title of District Court and Cause.]

Defendant's Requested Instruction No. 24

If a witness who could provide testimony which would be material to some issue in the case has not been called as a witness by the government, and the failure to call him has not been explained to your satisfaction, you may infer that his testimony, if produced, would be adverse to the government, since the government has the burden of proof throughout all stages of the trial.

Refused. [6]

Defendant's Requested Instruction No. 28

The defendant is charged in this case with wilfully attempting to evade and defeat his income taxes for each of the years 1949, 1950, 1951, and 1952. This offense is defined in the law as a felony. The law permits you, if you so desire, to find him guilty of certain lesser offenses which are misdemeanors, rather than finding him guilty of the felony alleged in the information. Accordingly, if you are not convinced beyond a reasonable doubt that the defendant is guilty of the felony offense alleged in the information with respect to any or all of these years, you may find him guilty of either one of the following misdemeanor offenses if you are convinced beyond a reasonable doubt that he is guilty of such misdemeanor offense. The two misdemeanor offenses, of which you may find the defendant guilty, instead of finding him guilty of the felony charge, are as follows:

(1) A wilful failure to pay his correct income tax for any of the years involved in the information, and

(2) The delivery of a false or fraudulent return to the Collector or Director of Internal Revenue with intent to defeat or evade the assessment intended to be made by the Collector or Director of Internal Revenue of the amount of tax owing by the defendant.

Sections 145(a) and 3616(a), Internal Revenue Code of 1939. Rule 31(c), Federal Rules of Criminal Procedure.

Refused. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find the defendant, Wayne P. Kelley, is guilty as charged in the First Count of the Information; is guilty as charged in the Second Count of Information; is guilty as charged in the Third Count of the Information, and is guilty as charged in the Fourth Count of the Information.

Dated this 13th day of April, 1956.

/s/ CLARENCE K. JONES,
Foreman.

[Endorsed]: Filed April 13, 1956. [8]

United States District Court
for the District of Nevada

No. 12,886

Viol. Sec. 145(b), Title 26, U.S.C.

UNITED STATES OF AMERICA

v.

WAYNE P. KELLEY

JUDGMENT AND COMMITMENT

On this 27th day of April, 1956, came the attorney for the government and the defendant appeared in person and with counsel, namely, George Lohse, Esq., and Spurgeon Avakian, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of Guilty of the offense of

Count One

That on or about the 13th day of January, 1950, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1949 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1949, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$4,163.66 and that the amount of tax due and owing thereon was the sum of \$392.38, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$11,525.66, upon which said net income there was owing to the United States of America an income tax of \$1,833.22. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Two

That on or about the 13th day of March, 1951, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1950 was married, did wilfully and knowingly attempt to defeat and evade a large part

of the income tax due and owing by him and his wife to the United States of America for the calendar year 1950, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$10,125.20 and that the amount of tax due and owing thereon was the sum of \$1,441.78, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$22,576.95, upon which said net income there was owing to the United States of America an income tax of \$4,833.98. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Three

That on or about the 15th day of March, 1952, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1951 was married, did wilfully and knowingly attempt to defeat and evade the large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$23,085.66 and that the amount of tax due and owing thereon was the sum of

\$5,658.40, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$28,102.56, upon which said net income there was owing to the United States of America an income tax of \$7,684.10. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

Count Four

That on or about the 16th day of March, 1953, in the District of Nevada, Northern Division, Wayne P. Kelley, late of Reno, Nevada, who during the calendar year 1952 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952, by filing and causing to be filed with the Director of Internal Revenue at Reno, Nevada, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of \$38,562.68 and that the amount of tax due and owing thereon was the sum of \$13,967.98, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of \$45,058.42, upon which said net income there was owing to the United States of America an income tax of \$17,942.22. In violation of Section 145(b), Internal Revenue Code (1939); 26 U.S.C., Section 145(b).

as charged in the Information, and the court having asked the defendant whether he has anything

to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of, Count 1: 2 Years and fined \$6,000.00; Count 2: 2 Years and fined \$6,000.00; Count 3: 2 Years and fined \$1,500.00; Count 4: 2 Years and fined \$1,500.00, also Costs of Prosecution to be taxed.

It Is Ordered that the imposition portions of the sentence on Counts 2, 3 and 4 shall run concurrently with each other and with Count 1, so that the total imprisonment is 2 years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN R. ROSS,

United States District Judge

OLIVER F. PRATT,

Clerk

/s/ By BERNARD SUPERAP,

Deputy Clerk

A True Copy Certified this 27th day of April,
1956.

[Seal] /s/ OLIVER F. PRATT,

Clerk

[9]

[Title of District Court and Cause.]

ORDER DENYING MOTION
FOR NEW TRIAL

Defendant's motion for new trial came on for argument this 26th day of April, 1956, Stanley H. Brown and Clyde R. Maxwell, Jr., appearing for the government, and George Lohse and Spurgeon Avakian appearing for the defendant, and said motion being fully argued, and submitted to the Court; now, therefore, after all matters presented at argument being fully considered, and good cause appearing, it is

Ordered, that the defendant's motion for a new trial be and the same is hereby denied.

Dated at Carson City, Nevada, this 26th day of April, 1956.

/s/ JOHN R. ROSS,

United States District Judge [11]

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 27th day of April, 1956, and respectfully states as follows:

(1) Appellant's name and address are as follows: Dr. Wayne P. Kelley, 275 Bret Harte Avenue, Reno, Nevada.

(2) The names and addresses of appellant's attorneys are as follows: [12] George Lohse, 40 West First Street, Reno, Nevada, telephone: Reno 2-3706; Spurgeon Avakian, Financial Center Building, Oakland 12, California, Telephone: GLencourt 2-2133.

(3) The offense of which appellant was convicted is an attempt to defeat or evade income tax for the years 1949 to 1952, inclusive, in violation of Section 145(b) of the Internal Revenue Code. The information alleged that defendant attempted to evade tax in the amount of \$10,832.98.

(4) The judgment of the Court was that defendant be fined \$6,000 on each of Counts 1 and 2, and \$1,500 on each of Counts 3 and 4, plus the costs of prosecution, and that defendant be committed to the custody of the Attorney General for a term of two years on each of said four counts, said terms to be served concurrently. Said judgment was rendered on April 27, 1956.

(5) Appellant appeals from said judgment to the United States Court of Appeals for the Ninth Circuit.

Dated this 27th day of April, 1956.

GEORGE LOHSE and
SPURGEON AVAKIAN,

/s/ By SPURGEON AVAKIAN,
Attorneys for Appellant [13]

Acknowledgment of Service Attached.

[Endorsed]: Filed April 27, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be and it hereby is extended to and including July 16, 1956.

Dated this 7th day of May, 1956.

/s/ JOHN R. ROSS,

United States District Judge [18]

[Endorsed]: Filed May 7, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

Upon motion of defendant, and good cause appearing:

It Is Hereby Ordered, pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, that the time for filing and docketing the record on appeal in the above-entitled matter be and it hereby is extended to and including September 10, 1956.

Dated this 2nd day of July, 1956.

/s/ JOHN R. ROSS,

United States District Judge [19]

[Endorsed]: Filed July 2, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court, or true and copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of August, 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk

In the United States District Court
for the District of Nevada

No. 12,886

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAYNE P. KELLEY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Jury Trial

Before: Hon. John R. Ross, Judge.

Be It Remembered, That the above-entitled mat-

ter came for trial before the Court, sitting with a jury, on Monday, March 26, 1956, at 10:00 o'clock a.m., at Carson City, Nevada.

Appearances: Stanley H. Brown, Esq., Clyde R. Maxwell, Esq., Attorneys for Plaintiff. George Lohse, Esq., Spurgeon Avakian, Esq., Attorneys for Defendant.

The following proceedings were had:

Plaintiff's Opening Statement

Mr. Maxwell: The Court and counsel, ladies and gentlemen of the jury:

As the Court has already informed you, it is now my purpose to give you some idea of what the government expects to [1] prove to you in this case. Naturally, we can't take it witness by witness, but I am going to try and give you an idea of the theories of proof held by the government, so that you can see the general purport of the witnesses' testimony as they are on the stand. You should know where his testimony fits in the general picture. When I finish, counsel for the defendant will have an opportunity to make his opening statement to you, or if he sees fit, he may reserve that until the opening of the defendant's case.

As the Court has already inferred, the statements of a lawyer on either side of this case are not evidence and they are not to be considered by you as such. If any of the statements that I make, or that defendant's attorney makes, conflicts with your understanding of what the evidence is, then you should take your understanding of the evidence.

Now as the Court has already informed you, this is a criminal case. As members of the jury in this case, you have a duty to perform. You have sworn to an oath to do that duty. Your job is not an easy one and it involves a careful consideration, not only of the facts that the government will present to you for two or three weeks, but the information that the defendant presents to you. As told you, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, at which time the presumption of innocence disappears. The Court will instruct you fully as to the meaning of the [2] words "reasonable doubt." I think it suffices for the moment to say it is not a fanciful doubt, but it is a substantial real doubt. Now this case is a criminal income tax case. The payment of taxes is not relished by any one. When April 15th rolls around, nobody likes very much to pay taxes, but we all do it and the government receives its revenue. If we didn't do it, the government wouldn't receive its revenue.

Mr. Avakian: Your Honor please, I object to argument at this time.

Mr. Maxwell: If the Court please, I am simply trying to put in a little background for use of the jury. I understand this man has not so far been called and I think the Court and counsel should indulge me a little bit on that. I will try not to wander too far afield.

The Court: Counsel, the specific purpose is to outline the case from the standpoint of testimony.

The Court will go along with you. The objection is overruled.

Mr. Maxwell: As a matter of fact, in my outline I had concluded that particular phase.

Now in this case you have heard the clerk read the indictment. It charges an intent to evade and defeat taxes on the part of the defendant for the years 1949 to 1952. The indictment says that during those times, one for each year, 1949 to 1952, that he filed returns in each one of those years, on which [3] he understated his income and his tax. Now you probably recall also for 1949 it said the return showed approximately four thousand dollars income, when then and there well knew it should have been \$11,500, in round figures, and that the return which was filed showed approximately \$400 taxes, when it should have shown about \$1800 taxes. Now I am going to try to let the figures go for the present. The figures in the indictment need not be proven exactly by the government. All that is necessary to sustain an indictment means that a substantial amount of income be left off.

In this case the defendant, who is charged with income tax evasion, we are, of course, concerned with what was on his return, but more so we are interested in finding out what is the difference between avoidance and evasion of income tax. If the defendant here merely sought to avoid his taxes, he is not guilty; if he attempted to evade his taxes, he is guilty. I would like to give a little example of the difference between the two. Suppose that a man has six thousand dollars net income for a year.

Probably we are all familiar with the fact he has three different ways to compute the taxes. He could take the standard deductions. He chooses the one which produces the least tax, we will say \$400, out of the three, possibly one is \$445, another \$415, but he chooses the one that is the least. Now there is nothing wrong with that. You and I do it all the time, but if the [4] same man, instead of putting six thousand dollars net income down on his return, only shows four thousand dollars, well knowing he had six thousand, and shows his tax is only three hundred, that then would be tax evasion.

In a tax evasion case, the government has to prove unreported income for each year charged in the indictment. The government has to prove the intent, that is, the knowledge and the purpose necessary to show that this defendant deliberately attempted to evade the taxes. In short, the government has to show that the defendant knew he left off income from his return and knew if he put it in his return, he would have had to pay more taxes, or in the case of the exemptions, the government would have to show that the defendant claimed exemptions on his return to which he was not entitled. Furthermore, the government would have to show that the defendant knew he was not entitled to that expense. For example, if the defendant claimed business expense for an airplane, yet used that airplane for personal purposes, and the government could show he put that down on his return, well knowing he was using it for personal purposes and not for business purposes, then that would tend to understate his income and be tax evasion.

Now let us come down to some specific figures in this case. What is the government going to show you on the income of the defendant? The defendant is a practicing doctor and surgeon. During the years 1949 to 1952 he had many patients. [5] Some 1100, I believe, in Reno. We are going to present to you testimony of approximately 100 patients, who will testify as to amounts paid to the doctor during the years 1949 to 1952. Now 100 witnesses themselves on that same line may be a little bit boring. It is the only way the government has of bringing proof to of payments which were made. We will also show what payments were recorded on the records of Dr. Kelley. The plaintiff made a transcript of the records available to it.

Then the third thing we will show, of course, is the income on the income tax returns. We will show to you that that was prepared, income was computed from the duplicate bank deposits which the doctor kept, and receipts, with a small additional amount of what we will call unidentified receipts, that we could not tie down to any particular patient. We will show to you the transcript of the patient cards kept by the doctor and the entry on the patients' cards as being paid. Now outside of the duplicate deposit slips, the cash receipt books, patient cards, those are the only books Dr. Kelley ever showed to the Revenue agents. I think the evidence will produce, in a capable manner, that Dr. Kelley has other and more complete records.

Now as an example of the patient's testimony, let us take Mrs. Johnson. The government will show in the year 1949 the deposit slips do not show any re-

ceipts from Mrs. Johnson, as being received from Mrs. Johnson. The patient card has entry [6] as being received from Mrs. Johnson. Mrs. Johnson has cancelled check showing \$317 paid to the doctor for the year 1949 by check; showing that checks had been cashed in 1950. He reported deposit, patient card, \$75.00 charged, but Mrs. Johnson will testify paying \$25 in cash and \$185 in checks. In 1951 nothing in the deposits. The patient card will show \$75 Mrs. Johnson paid. Mrs. Johnson will testify she paid \$110 in cash, has a receipt. On the patient card \$150. This was a source of reported income—cash \$110, checks \$502, total paid \$612.

Now besides the testimony of the patients as to individual fees paid Dr. Kelley, the government will show to you that Dr. Kelley prepared his own return and claimed on his returns expenses for depreciation, flew his own plane, he flew to a couple of conventions. We will show you, by and large here, when you purchase for pleasure, as you are well aware, I am sure, you can't deduct expenses for your personal pleasure vehicles, your automobile or your airplane.

Now in order to perhaps further show you the income of Dr. Kelley for these years, the government is going to show you his income as computed on the net worth and expenditures basis. Now that is a long term. It really isn't as bad as it sounds. What you do, in effect you take what a man has at the beginning of the year and subtract that amount from what he has at the end of the year. If you have more at the end of the year, you come up with

your net increase. You add to that expenses [7] and that gives your net income. Let me give you a very brief example of the net worth system which the government will attempt to use. Put down in this column (illustrating on blackboard) beginning of year 1949, end of year 1949. A man will have a bank account, a house, an automobile, other things perhaps that will come up at the beginning of the year. At the end of the year we will say that these assets he has are thirty thousand dollars, and he has liabilities, notes, or mortgage on his house, at the end of the year ten thousand dollars. By subtracting his liabilities to get his net worth; net worth at beginning of 1949 would be five thousand dollars, at the end of 1949 would be twenty thousand dollars. It looks like he had a net worth increase of fifteen thousand dollars during that year. Well now to that you have to add the living expenses. They will have been spent for food, clothing, and say it costs him four thousand dollars per year to live, and he also pays some taxes, which aren't in here either, say he paid four hundred dollars taxes during the year, so it looks like he will come up to \$19,400 on the net worth system. What does he report on his return? Well, he reported only ten thousand dollars on his return. It looks like he had nine thousand dollars unreported income somewhere. And that is what we are going to show you with respect to Dr. Kelley for the years 1949 to 1952. We think we will be able to show you by that result, not only did he have unreported income, which the patients will testify to, but that [8] he had much more which we didn't

know about. We will be able to show you that he had many more patients than the government puts here in evidence.

Now besides proving of income, as I told you, the government is going to have to produce evidence of Dr. Kelley's intent, wilful intent, to evade and defeat his taxes. Now how do we do that? How do you know whether you, or anybody else filed a false return with intent to evade and defeat their taxes? They don't come up and tell you or I about it. They prepared the return and mailed it and no one ever sees it except the person making out his return and the United States government. Now how do they prove that the defendant's intention was to evade taxes? Well, the Court will instruct you we have to do this by judging what his intentions were at the time he performed the various acts that he did perform. You have to judge by his actions, since we have no other way to do it. The easiest way to do this is just to say, "What would I have been doing if I had done such and such an act; why would I have been doing this? Perhaps one little thing all by itself does not mean much, but then the next act, the next act, the next act, all shape up together to determine what was Dr. Kelley's intention at the time he filed his returns. We are going to show you a number of acts which we believe, and earnestly contend, will show the defendant's intention to evade and defeat his taxes.

First of all I am going to call to your attention, we [9] will show that the defendant prepared these detailed returns by himself. He had some pretty in-

volved activities which required a pretty good knowledge of the income tax law. The doctor held assets. We are going to show what these assets were in the net worth statement. We are going to show you how many years that these assets were in the names of other people, and as the Court will instruct you, that is one of the acts that you can consider in connection with determining Dr. Kelley's intention.

The government will show that there were some records destroyed by Dr. Kelley.

The government will show that Dr. Kelley handled his ordinary affairs to avoid making the records which are usual in transactions of a business. The government will show that the defendant, in all probability, kept his second set of correct books, which we have never seen. The government will also show you methods the doctor used to keep his records in the office, how these were not made to the proper records and how checks were cashed and how payments made in cash went into the doctor's pocket. We will also show you that when first approached by the Internal Revenue agents to explain rather large wealth and rather meager record of income in his income tax return, that the doctor came out with a very fantastic story of fabulous amounts while——

Mr. Avakian: These words, "fabulous" and "fantastic" are argument. [10]

The Court: I have instructed the jury, and I now instruct them again, that argument of counsel does not amount to evidence and they may both be

carried away in argument, so have that in mind.

Mr. Maxwell: We will show them Dr. Kelley was not able to explain his assets. In short, ladies and gentlemen, what we are going to try to do might be a little bit tedious and long-winded, but we have to do it that way to show to you that Dr. Kelley had very large amounts of money and that they were not reported and that they were not reported deliberately, in an attempt to evade and defeat income taxes that he knew he owed to the government. Thank you.

(Recess taken at 2:55 until 3:10 p.m.)

3:10 p.m.

Defendant and counsel present in court. Presence of the jury and alternate jurors stipulated.

Mr. Maxwell: May it please the court, we have a stipulation that has been entered into between the government and the defendant, as to the income tax returns of the defendant for the various years. I will first ask to have marked a document which contains both the 1942 and 1943 income tax returns of the income of Wayne Kelley, and it is stipulated between the government and the defendant that that document is an income tax return for those years, 1942 and 1943.

The Court: You are offering it in evidence, pursuant [11] to the stipulation or for identification?

Mr. Maxwell: I will offer it in evidence at this time.

Mr. Avakian: Your Honor, we have no objection

to any of the income tax returns which Mr. Maxwell has shown to us, if it will save time.

The Court: Very well, the offer will be received in evidence as government's Exhibit 1.

Mr. Maxwell: Then next the return of Wayne P. Kelley for the year 1946. I ask that that be marked as government's exhibit next in order.

The Court: It will be so marked, government's Exhibit 2.

Mr. Maxwell: Next the return of Mrs. Lois K. Kelley for the year 1946.

The Court: The offer will be received in evidence as government's Exhibit 3.

Mr. Maxwell: The return of Wayne P. Kelley for the year 1947.

The Court: The offer will be marked government's Exhibit 4 in evidence.

Mr. Maxwell: The income tax return of Mrs. Lois K. Lekkey for the year 1947.

The Court: The offer will be received in evidence as government's Exhibit 5.

Mr. Maxwell: The income tax return of Wayne P. and [12] Lois K. Kelley for the year 1948.

The Court: The offer will be received in evidence as government's Exhibit 6.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1949.

The Court: The offer will be received in evidence as government's Exhibit 7.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1950.

The Court: The offer will be received in evidence as government's Exhibit 8.

Mr. Maxwell: The return of Wayne P. and Lois K. Kelley for the year 1951.

The Court: The offer will be received in evidence as government's Exhibit 9.

Mr. Maxwell: And the return of Wayne P. and Lois K. Kelley for the year 1952.

The Court: The offer will be received in evidence as government's Exhibit 10.

Mr. Maxwell: I have next a Certificate of Assessment showing taxes paid for the years 1942 to 1947 inclusive. It is stipulated between defendant and the government that this certificate is a transcript of the records of the Director of Internal Revenue in the office of the District Director of Internal Revenue at Reno. [13]

The Court: The offer will be received in evidence as government's Exhibit 11.

Mr. Maxwell: Next document is Certificate of Assessment and payments, showing tax paid as to years 1948 to 1952 inclusive. It is also stipulated between defendant and the government that this document is a transcript of the Collector's records, showing payments for those years.

Mr. Avakian: May I ask counsel if correction has been made on it that he mentioned to us?

Mr. Maxwell: It has.

The Court: The offer will be received in evidence as government's Exhibit 12.

Mr. Maxwell: As exhibit next in order, I have Certificate of Assessments and payments, showing

amounts paid by Dr. Wayne P. Kelley on the records of the District Director at Syracuse, New York for the years 1932 through 1941 inclusive.

The Court: The offer will be received as government's Exhibit 13 in evidence.

ARTHUR W. JOHNSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, your name is Arthur W. Johnson?

A. That is right.

Q. And you have been previously sworn in this matter have you [14] not? A. That is right.

Q. Where do you reside, sir?

A. Reno, Nevada.

Q. And you have resided in Reno how many years, to the best of your recollection?

A. Fifteen years.

Q. What is your occupation or profession?

A. Assistant cashier of the Security National Bank of Reno.

Q. How long have you been employed by the Security National Bank? A. Nine years.

Q. Briefly what do your duties consist of?

A. Finance personnel.

Q. You appeared here today pursuant to subpoena issued by me, did you not?

A. That is correct.

Q. When you were served with subpoena, you

(Testimony of Arthur W. Johnson.)

were also served with subpoena ducas tecum, requesting you to bring certain original records?

A. Yes, sir.

Q. Do you have those records with you?

A. Yes.

Q. Did you bring with you two signature cards of Phyllis I. Kelley on the Phyllis I. Kelley account? [15]

A. Yes.

Q. Did you also bring with you a ledger sheet pertaining to the savings account of Phyllis I. Kelley, account 5192?

A. I did.

Q. May I have it please? Did you also bring with you certain deposit slips, pertaining to deposits made in that account by Phyllis I. Kelley?

A. Yes.

Q. May I have them please? Did you also bring with you a collection ticket, which is collection ticket No. 160, showing a deposit by Lois K. Kelley, drawn on account of Usabel Cobb?

A. Yes, I did.

Q. Did you also bring with you savings withdrawal ticket dated July 15, 1950, in the amount of \$8,896.21, together with a check drawn payable to the order of Phyllis I. Kelley in the same amount?

A. Yes, I did.

Q. May I have it. You have also heretofore caused certain photostatic copies to be made and you have delivered them to me, have you not?

A. Signature card.

Q. Those records you have handed to me were kept in the ordinary course of business as a bank-

(Testimony of Arthur W. Johnson.)

ing institution by the Security National Bank, were they not? A. That is right. [16]

Q. They were kept under your direction and control at the bank, is that correct?

A. That is correct.

Mr. Brown: We offer the ledger sheet No. 5192 as plaintiff's Exhibit next in order.

Mr. Lohse: There is no objection to its admission, your Honor.

The Court: The offer will be received as government's Exhibit 14.

Mr. Brown: We offer the signature cards of Phyllis Irene Kelley and Phyllis I. Kelley on account No. 5192, as plaintiff's exhibit next in order.

Mr. Lohse: No objection, your Honor.

The Court: The offer will be received as government's Exhibit 15. There are two cards?

Mr. Brown: The two cards are stapled together, your Honor. We offer the deposit slips for May 5, 1948, May 7, 1948, May 14, 1948, May 17, 1948, July 15, 1948, September 23, 1948, November 24, 1948 and February 15, 1950 as one exhibit, plaintiff's exhibit next in order.

Mr. Lohse: We have no objection, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 16.

Mr. Brown: We offer the collection slip No. 160 as plaintiff's exhibit next in order. [17]

Mr. Lohse: No objection your Honor.

The Court: It will be received in evidence as government's Exhibit 17.

(Testimony of Arthur W. Johnson.)

Mr. Brown: We offer the savings withdrawal ticket together with check 24224, in the amount of \$8,806.21, payable to Phyllis I. Kelley, as one exhibit, plaintiff's exhibit next in order.

Mr. Lohse: There is no objection, your Honor.

The Court: The offer is admitted in evidence as government's Exhibit 18.

Mr. Brown: At the conclusion of the testimony of this trial, we will move the Court for an order to substitute photostatic copies in lieu of the originals.

Mr. Lohse: We would be willing that be done whenever the government chooses.

Mr. Brown: We would prefer to wait. You may examine.

Mr. Lohse: No cross-examination of the witness, your Honor.

(Witness excused.)

ERNEST MARTINELLI

a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): You have been previously sworn? A. Yes.

Q. State your name. [18]

A. Ernest Martinelli.

Q. Where do you reside?

A. Sparks, Nevada.

Q. What is your occupation? A. Banker.

Q. What position do you hold?

(Testimony of Ernest Martinelli.)

A. Assistant cashier, finance officer, First & Virginia Branch First National Bank of Nevada.

Q. And in your capacity as Assistant Cashier, do you have the care, custody and control of records of the First National Bank of Reno? A. Yes.

Q. Mr. Martinelli, you have been asked to bring here today certain records of the First National Bank of Reno, namely, first, records pertaining to the account of Lois K. Kelley, savings account 6034, for the period of the account, including the ledger sheets, signature cards and deposit slips. Do you have those records? A. I do.

Q. May I have them please? I see you have handed me three signature cards. Would you tell me what those cards are, please?

A. This signature card is on the savings account No. 6034, Lois K. Kelley. These other two signature cards are the prior savings account.

Q. And in what name are those? [19]

A. Lois W. Kays.

Mr. Maxwell: We will offer the second cards described as government's exhibit next in order.

Mr. Avakian: We have no objection to the first card. We object to the two prior cards because we do not see the materiality.

The Court: First card will be received in evidence as government's Exhibit 19 and the other two cards will be marked Exhibit 19(a) for identification.

Q. Now, sir, you have given me what appear

(Testimony of Ernest Martinelli.)

to be deposit slips. Can you tell me what those are, sir?

A. Yes, these are deposits to the savings account No. 6034 in the name of Lois I. Kelley.

Q. Can you tell approximately for what period they extend?

A. August 1, 1946 to April 22, 1948.

Mr. Maxwell: I ask that these be marked for identification at this time, your Honor.

The Court: The offer will be marked Exhibit 19(b) for identification.

Q. And you have handed me two ledger sheets. Can you tell me what those are, sir?

Q. These are ledger sheets pertaining to savings account No. 6034 in the name of Lois K. Kelley, August 1, 1946 up to May of 1948. [20]

Q. Does it show the accounts have been closed out on May 4, 1948? A. Yes, they have.

Mr. Maxwell: May these be marked as government's exhibit for identification next in order?

The Court: They will be marked Exhibit 19(c) for identification.

Q. Mr. Martinelli, you were also asked to bring the records of the First National Bank of Reno pertaining to the account of Wayne P. Kelley or Lois K. Kelley, savings account No. 10927, for the period 5-4-48 to 12-31-52 inclusive, including ledger sheets, signature cards and deposit slips. Have you brought those records for us? A. Yes.

Mr. Maxwell: May I have the signature cards on that account. We will offer what appears to be

(Testimony of Ernest Martinelli.)

signature of Wayne P. Kelley, M.D. or Lois K. Kelley, account No. 10927, and ask that they be marked government's exhibit next in order. I will offer it in evidence.

Mr. Lohse: No objection.

The Court: The offer will be received in evidence as government's Exhibit 20.

Q. Mr. Martinelli, did you bring the deposit slips on the savings account No. 10927, in the name of Wayne P. Kelley and/or Lois K. Kelley?

A. Yes. [21]

Q. May I have them? Over what period do these extend, sir, as far as you can tell?

A. May 13, 1948 to December of 1952.

Mr. Maxwell: I ask that these deposit slips be marked as government's exhibit next in order and offer them in evidence.

Mr. Avakian: We have no objection to those relating to the four years involved in the indictment here, but we do object to the earlier years. They are irrelevant and immaterial. In connection with those to which we have no objection, I suggest that they be listed in chronological order before they are stapled here. I see that they are not in chronological order.

Mr. Maxwell: I believe they were in chronological order. I have no objection to having them resorted. But as to the prior year, as to the period from May to December, 1948, I think that will have a bearing on the beginning net worth.

Mr. Avakain: The bank balance at the end of

(Testimony of Ernest Martinelli.)

1948 would have a bearing on the beginning net worth, but individual deposits made during the year would have no bearing on the net worth at the end of the year.

Mr. Maxwell: I think that would have a distinct bearing.

The Court: Objection overruled. They will be received in evidence as government's Exhibit 21.

Q. Mr. Martinelli, did you also bring the ledger sheets on the savings account No. 10927? [22]

A. Yes.

Q. For what period are those ledger sheets?

A. May 4, 1948 to April 13, 1953.

Q. Is there a statement on there as to the balance at the end of the year 1952? A. Yes.

Mr. Maxwell: And can the balance of the ledger sheet be deleted?

Mr. Avakian: If we may see it, your Honor, we may have no objection.

Mr. Maxwell: Except as to entries of the year 1953, I will offer the ledger sheets as described, in evidence.

Mr. Avakian: We would object to that portion which relates to the period prior to 1949 and 1948. As to the balance, we have no objection to the offer.

The Court: Same ruling. The exhibit will be received as government's Exhibit 22.

Q. Mr. Martinelli, you were also asked to bring records pertaining to the commercial account of Wayne P. Kelley and/or Lois K. Kelley, for the

(Testimony of Ernest Martinelli.)

period January 1, 1949 to December 31, 1952. Have you brought those documents? A. Yes.

Mr. Maxwell: Would you give me the signature card for that account, please? I will offer the signature card on the commercial account of Wayne P. Kelley and Lois K. Kelley. [23]

Mr. Avakian: No objection to its admission, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 23.

Q. Did you bring the deposit slips on that commercial account, Mr. Martinelli? A. Yes.

Mr. Maxwell: I will offer the deposit slips on the account for the period January, 1949 to December, 1952.

Mr. Avakian: Your Honor, there would appear to be one or two hundred of these. We have not had an opportunity to see these before. Would it be possible to defer the admission of these until perhaps tomorrow?

The Court: In order to keep the thing in order, I think we should admit it, subject to the objection. The offer will be admitted as government's Exhibit 24.

Q. Do you have the ledger sheets for the commercial account of Dr. Kelley? A. Yes.

Q. What period do the ledger sheets cover, please?

A. May of 1948 to January 28, 1953.

Q. Is there a place on there showing the balance as of December 31, 1948? A. Yes, there is.

(Testimony of Ernest Martinelli.)

Mr. Maxwell: That is on the second ledger sheet. We will offer the balance of the sheets only, showing balance on December 31, 1948, to and including showing balance on December 31, 1952. It can be deleted if counsel desires.

Mr. Lohse: No objection.

The Court: The offer will be received as government's Exhibit 25.

Q. Mr. Martinelli, you were asked to bring certain records with respect to the account in your bank of Wilson, Johnson & Higgins, Reno, Nevada, for the period beginning January 1, 1950, to and including December 31, 1951, including ledger sheets and deposit slips for the following dates: June 21, 1950, July 21, 1950, July 28, 1950, September 22, 1950, October 16, 1950, April 2, 1951, March 20, 1951, April 16, 1951, May 16, 1951, March 30, 1951. Did you bring those records? A. Yes.

Q. May I have the deposit slips for that account?

Mr. Maxwell: I will offer, and ask to be marked for identification at this time, the deposit slips of Wilson, Johnson & Higgins.

The Court: The offer will be received for the purpose of identification and marked government's Exhibit 26.

Q. Did you also bring the ledger sheets on that account, sir? A. Yes. [25]

Q. That is for what period, sir?

A. March 17, 1950 through November 22, 1952.

Mr. Maxwell: I ask that these ledger sheets be

(Testimony of Ernest Martinelli.)

marked for identification as government's Exhibit 26(a).

The Court: They may be so marked.

Q. Mr. Martinelli, you were also asked to bring records pertaining to cashier's check No. 20101, dated November 24, 1948, for five thousand dollars, payable to Lois Kelley, including application for cashier's check. Did you bring those, the application and cashier's check? A. Yes.

Mr. Maxwell: I will offer application for cashier's check and a check, payable to Lois K. Kelley, for five thousand dollars, and dated November 24, 1948.

Mr. Avakian: We object to this on the ground it lies outside the period covered by the indictment. I do not see its materiality.

Mr. Maxwell: I think we should be permitted to put in foundation documents.

Mr. Avakian: I do not see what the purchasing of a cashier's check on November 24, 1948 has to do, your Honor, with the question of the income for the years 1948 to 1952.

Mr. Maxwell: Don't you think it has any relation to cash on hand December 31, 1948?

The Court: The offer will be received and marked government's [26] Exhibit 27.

Q. Mr. Martinelli, you were also asked to bring records relating to cashing certain war bonds on March 5, 1951, \$1500, and on May 16, 1951, in amount of \$6,667.50, by Wayne P. Kelley or his wife, Lois K. Kelley, or both. Did you bring those

(Testimony of Ernest Martinelli.)

records? A. Only partially.

Q. What did you bring?

A. The two bonds which you mentioned cashed on March 5, 1951.

Q. What is the amount?

Mr. Avakian: We object, they are not offered in evidence.

Mr. Maxwell: I am trying to identify them.

Q. Do you have records for the sale or cashing of war bonds on March 5, 1951? A. Right.

Q. In the amount of \$1500?

A. Not exactly.

Q. How much? A. Well, \$1590.

Q. Now, Mr. Martinelli, the records that you have handed me appear to be photostats or pictures. Can you explain what they are? Are they original records or copies of original records?

A. They are copies of original records. The records we have are filmed. The bonds which are cashed are filmed. The film is kept as our record, the original is forwarded to the Federal [27] Reserve Bank.

Q. Are these documents which you have presented to me, are they film?

A. They are photographs taken from films.

Mr. Avakian: Your Honor, we have no objection to the authenticity of these records.

Mr. Maxwell: I will offer what appear to be two photostats of records showing bonds cashed on, I believe March 5, 1951, as government's exhibit next in order.

(Testimony of Ernest Martinelli.)

Mr. Avakian: No objection.

The Court: The offer will be received in evidence as government's Exhibit 28, the two photostats received as one exhibit.

Mr. Maxwell: Yes, your Honor.

Q. Now, Mr. Martinelli, did you bring records of cashing of bonds on May 16, 1951?

A. I have four, four cashed that day.

Q. But that is not a complete set of documents for cashing bonds that day? A. No.

Q. Do you have the remaining documents?

A. They are being processed right now.

Q. And you have not received them? A. No.

Mr. Maxwell: Will counsel stipulate that they may be [28] put in as part of the exhibit to be marked and numbered?

Mr. Avakian: We would be happy to do that.

The Court: What date does this refer to?

Mr. Maxwell: Refers to bonds cashed on May 16, is that correct?

The Court: 1948?

Mr. Maxwell: 1951. I will offer these as government's exhibit next in order, with the proviso that the offer may be attached to the other portions, to the same exhibit and numbered the same when received from the bank.

Mr. Brown: I might explain to your Honor the bank ran out of photostat paper.

Mr. Avakian: No objection.

The Court: The offer will be received in evidence as government's Exhibit 29, with the understanding

(Testimony of Ernest Martinelli.)

that additional photostats showing bonds cashed upon the same date may be added to the exhibit.

Q. Now, Mr. Martinelli, you were also asked to bring deposit slips on the account of Wayne P. Kelley? A. Yes, sir.

Q. Have you been able to locate them?

A. No.

Q. Mr. Martinelli, you have also presented to me photostats of these documents that you have presented here today, and the government will ask that these photostats be substituted for [29] the original documents after the verdict is returned in the case.

Mr. Avakian: We will be glad to stipulate to that, your Honor.

Mr. Maxwell: Does the Court desire to have these photostats marked for identification?

The Court: They are not offered yet. What has the Court to do with them?

Mr. Maxwell: You may examine.

Mr. Avakian: No cross examination.

(Witness excused.)

ROBERT M. ERICKSON

a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, will you state your full name?

A. Robert M. Erickson.

(Testimony of Robert M. Erickson.)

Q. You have been previously sworn in this matter? A. Yes.

Q. Where do you live?

A. 610 California Avenue, Reno.

Q. You have lived there how long?

A. Since 1935.

Q. What is your occupation?

A. Manager of the Washoe Title Insurance Company.

Q. How long have you been manager? [30]

A. Three years.

Q. And you were employed by the Washoe County Title Insurance Company for many years prior to that, is that correct? A. Yes, it is.

Q. Briefly, what do your duties consist of?

A. Manager and vice-president.

Q. You appear here pursuant to a subpoena issued by me, do you not? A. Yes, sir.

Q. And you were also served with subpoena duces tecum to bring certain records, is that correct? A. That is correct.

Q. Did you bring the records of your company, including receipt and disbursements ledger pertaining to Escrow No. 562B? A. Yes.

Q. Do you, in your records, have a letter in the nature of escrow instructions, signed by Wayne P. Kelley, addressed to R. Redelius, Realtor, agent for R. Coon of Reno, dated August 4, 1947?

A. Yes.

Q. May I have it please. Do you, in connection with that file, have your instructions and receipt

(Testimony of Robert M. Erickson.)

for money, being application No. 35924, pertaining to escrow 562B, dated August 12th of 1947, signed by Winfield O. Kelley? A. Yes. [31]

Q. May I have it? Did you bring with you your ledger sheet, pertaining to Escrow No. 562B, showing receipts and disbursements from your receipt and disbursements ledger? A. Yes.

Q. May I have that? Mr. Erickson, did you remove this from the original ledger? A. Yes.

Q. Did you bring application for title insurance No. 35924, dated September 2, 1947? A. Yes.

Q. Mr. Erickson, these records were kept in the ordinary business of the Washoe Title Insurance Company? A. Yes.

Q. And it is customary to keep such records pertaining to escrow instructions, is it not?

Q. That is correct.

Q. Do you have other papers in that file, Mr. Erickson? A. Yes, there are other papers.

Q. Pertaining to that escrow? A. Yes, sir.

Mr. Brown: I wonder if I may see them.

Mr. Avakian: We have no objection, your Honor.

Mr. Brown: We will offer the described documents, your Honor, as one exhibit, plaintiff's exhibit next in order.

The Court: These are all documents referring to [32] Escrow 562B?

Mr. Brown: 562B.

The Court: The offer will be received in evidence as government's Exhibit 30.

Mr. Brown: We have photostat copies of those

(Testimony of Robert M. Erickson.)

records and at the conclusion of the trial, we will move that the original be withdrawn and returned to the Washoe County Title Insurance Company and photostats be substituted. You may inquire, Mr. Lohse.

Cross Examination

Q. (By Mr. Lohse): Mr. Erickson, as part of this exhibit, there is an account, showing the account stands under the name of Winfield O. Kelley and wife, is that correct? A. Yes, sir.

Q. Can you tell from the receipt on this ledger sheet from whom the cash was received that is reflected in this account?

A. The thousand dollar item appears to be a check given to Mr. Redelius and one of the other entries on the credit side of the ledger, the monies received, the \$5,992.64, appears to be the same, a check.

Q. And what is the next entry?

A. \$12,807.30; appears to be in the form of a check, being 50-750 and I would say that was probably submitted by Mr. Kelley.

Q. What is the next? A. \$5200.

Q. Does your title policy show, which is attached to this exhibit, [33] in whose name the title of that property was insured, after you received that money, of \$25,000 for this account?

A. The name is Winfield O. Kelley, a married man.

Q. That is on your policy No. 35924?

A. That is right.

(Testimony of Robert M. Erickson.)

Q. When did you say that policy was issued, Mr. Erickson? A. September 2, 1947.

Q. You knew, as a matter of fact, that this residence was actually that of Dr. Wayne P. Kelley, did you not? A. No.

Q. You weren't familiar with it? A. No.

Mr. Brown: That doesn't establish that he had no personal knowledge of the transactions.

Mr. Lohse: That's all.

Redirect Examination

Q. (By Mr. Brown): With reference to the policy of title insurance in the amount of \$25,000, insuring Winfield O. Kelley, does it show that Winfield O. Kelley was a resident of the City of Reno?

A. It states on the face of the policy.

Mr. Brown: That's all.

(Witness excused.)

GLENN E. DREW

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [34]

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, sir? A. Glenn E. Drew.

Q. Have you been previously sworn, Mr. Drew?

A. Yes, sir.

Q. Where do you reside, Mr. Drew?

A. 936 Ralston, Reno, Nevada.

Q. What is your occupation?

(Testimony of Glenn E. Drew.)

A. Assistant manager Nevada Credit Rating Bureau.

Q. Reno, Nevada? A. Yes, sir.

Q. You were asked to bring with you any records that you may have respecting collection services for the account of Wayne P. Kelley for the years 1949 to 1952, including cancelled checks payable to Dr. Kelley, amount paid to you for your commissions. Did you bring those records?

A. Yes, sir.

Q. May I have the checks, and what is the form of the records?

A. They are ledger sheets which I run through a bookkeeping machine and on which information the checks are issued.

Q. And the ledger sheets have a number of names on them. Can you tell me what those names mean, in general?

A. It means in this case we collected from this party this amount charged in the information column and the balance due is the amount owed. [35]

Q. And these ledger sheets run for what period, sir?

A. Actually I have the ledger sheets here for 1948 to 1954 to cover the period specifically to 1949.

Q. What period do the checks cover?

A. The checks cover from August, 1949 also to 1952. I do not have the checks for the first part of 1949, inasmuch as there was a change of ownership and the former owner was unable to locate the checks. I couldn't locate every one.

(Testimony of Glenn E. Drew.)

Q. Do the ledger sheets reflect the date paid?

A. They do.

Mr. Maxwell: I will offer the checks as government's exhibit next in order and the ledger sheets to follow. The ledger sheets are not offered for the writing on the ledger sheets for the period September 30, 1948 and for the period after September 30, 1952 are not offered.

Mr. Avakian: Your Honor, may I make this suggestion: The exhibits have quite voluminous detail. We won't be able to tell whether we want to cross until we examine each item. Would it be possible to have these marked for identification and released to our custody over night, so we may make that examination? Does counsel have any objection?

Mr. Maxwell: I have no objection to counsel examining the exhibits or withdrawing them, so far as that is concerned, [36] but I think the documents have been sufficiently identified by the witness to be material and should be admitted in evidence.

Mr. Avakian: We are in the position, your Honor, of not knowing whether we want to object until we examine the exhibit.

The Court: I believe you are entitled to examine the offer and the offer will be received and marked for the purpose of identification Exhibit 31 for the checks and 32 for the ledger sheets, for identification.

Mr. Avakian: Do I understand they will be released to us over night?

(Testimony of Glenn E. Drew.)

The Court: That is my understanding, if counsel so stipulate.

Mr. Maxwell: Yes, your Honor. It is my understanding counsel may desire to cross examine this witness.

Mr. Avakian: Yes, there may be some cross examination later. Are you through?

Mr. Maxwell: I believe so, your Honor. We might take a little more evidence if they were in evidence.

(Witness excused temporarily.)

(Jury admonished and recess taken at 4:30 P.M.) [37]

Tuesday, March 27, 1956, 10:00 A. M.

Defendant present with counsel.

Presence of the jury stipulated.

The Court: It is the Court's recollection at the close of yesterday's session, there were two exhibits offered that were marked for identification, No. 31 and No. 32, and it was for the purpose of permitting defendant's counsel to examine those items and make any objections to the offer of those exhibits in evidence. Is that right, gentlemen?

MR. DREW

resumes the witness stand on further

Direct Examination

Mr. Maxwell: Your Honor, at this time I renew my offer to put in evidence the checks and ledger sheets of the Nevada collection agency.

(Testimony of Glenn E. Drew.)

Mr. Avakian: Your Honor, may I say preliminarily that your Honor had extended me the courtesy of reserving the right to move to strike Exhibit 24, which was a voluminous group of deposit slips of the personal account of Dr. Kelley, and having had opportunity to examine them during the recess, I want to say that we have examined them and we are satisfied with them, so the record may be clear on them.

The Court: No objection as to Exhibit 24?

Mr. Avakian: That is right. Then in respect to the [38] proposed Exhibits 31 and 32 for identification first of all, with respect to Exhibit 31, which is a group of cancelled checks, the last check in this group is dated in May of 1954 and next to the last one is dated March, 1953, both of which are beyond the period involved in this case.

Mr. Maxwell: They may be withdrawn from the exhibit.

Mr. Avakian: May the record then show I am returning those two checks to counsel for the prosecution?

Mr. Maxwell: Counsel for the prosecution will return them to the witness.

Mr. Avakian: As to the balance of Exhibit 31, the cancelled checks, and Exhibit 32, the ledger sheets, we object to these, your Honor, on the basis of the opening statement of counsel; those checks and ledger sheets have no materiality in this case, because every dollar of payment shown by these

(Testimony of Glenn E. Drew.)

was included in the returns of the taxpayer and these checks could be of no value in this case. They show no unreported income, they could not be used in unreported income under the methods outlined by Mr. Maxwell. If the Court wants to go further into it, I can give further explanation. They are completely immaterial.

Mr. Maxwell: May I say is somewhat difficult to prove unreported income by specific items without first proving what has been reported, in order to eliminate reported items.

Mr. Avakian: My answer is that Mr. Maxwell, in his [39] opening statement, stated the method to get to the income when tax returns were filed was to report the income from certain checks and to add to that what he called the unidentified category. Every one of these checks—Mr. Lohse and I spent considerable time on them—are in the reported category, specific records which were made available to the agents, which they examined. The only possible effect would be to confuse the jury and create some erroneous items to show unreported income.

Mr. Maxwell: I am willing to stipulate these items were reported.

The Court: The objection will be overruled. Exhibits 31 and 32, heretofore marked for identification, will be admitted in evidence.

Q. Now, Mr. Drew, I hand you plaintiff's Exhibit 32 in evidence and I note that there are a number of names in the second column marked

(Testimony of Glenn E. Drew.)

"Item" column. Can you explain what those represent?

A. They represent debtors from whom money was collected.

Q. Those represent names of debtors to Dr. Kelley? A. That is right.

Q. Then your firm was in the business of collecting accounts for the doctor? A. Yes, sir.

Q. And the payments from those patients which you received, are they listed on the ledger sheet there? A. They are. [40]

Q. Are any of the payments from such payments which received by Dr. Kelley on the ledger sheets?

A. They are.

Q. Would you explain how that situation could arise?

A. In some instances accounts had been turned over to us for collection and our efforts were expended in collecting these accounts and in some instances the debtor, instead of paying us or bringing the money into our office, pays the doctor direct.

Q. Then what do you do after payment has been reported to you from his office?

A. We record it and charge the doctor the commission on that item.

Q. So your ledger sheet contains both items for that money collected by the doctor on accounts in your agency, as well as monies paid you?

A. Yes, sir.

Q. There are also entries on that ledger sheet referring to checks and, of course, the checks them-

(Testimony of Glenn E. Drew.)

selves are here in evidence, is that correct?

A. Yes.

Q. Would you explain what monies were paid to the doctor by check?

A. I have these starting with 1949. The first check issued was for February 28th, No. 1582, amount of \$29.50; another check [41] was issued March 31st, No. 1072, amount \$12.00, and so on through these check numbers and date of issuance.

Q. Do you include in those checks the amounts collected at the doctor's office?

A. The bookkeeping entailed the fact that when payments were made direct to the doctor, commission would be charged against the account on this check—I might cite one specific example, where a check was issued to the doctor, it would have been more had monies not been paid to him.

Q. And you reduce the monies due to him by credit for your commission on payments that were made directly to the doctor, is that correct?

A. Yes.

Mr. Maxwell: I have no further questions.

Cross Examination

Q. (By Mr. Avakian): Mr. Drew, I believe you stated that the reason you did not have the checks for the early part of 1949 was the former owner of this business had not been able to locate them?

A. That is right.

Q. I take it, then, that you came into this business sometime during the year 1949?

(Testimony of Glenn E. Drew.)

A. Not I personally. I was his employee since 1946.

Q. You had been an employee all this time?

A. Yes, the former owner of the business died and his brother and another man took over in August of 1949. [41-A]

Q. I was wondering if you had any idea where the checks for the early part of the year might be?

A. Well, Mrs. Holms, who was the widow of the former owner, took charge of a number of those former records, checks stubs and things like that, and some of them were stored at her home, some of them were destroyed. I have not been able to find them.

Q. I take it then that you have made a search for them? A. Yes, sir.

Q. Mr. Drew, in reference to Exhibit 32, the ledger sheets, would you tell us the number of checks shown on the ledger sheets that you were unable to find and produce in court here? I believe there were five. Would you verify that for me?

A. That is right.

Q. Then you produced 19 checks near the end of 1952, so that means during 1946 to 1949 to 1952 your agency issued a total of 24 checks, is that right? A. I haven't found the other checks.

Q. And generally your checks were issued on the last day of the month but not necessarily in every month? A. Right.

Q. And reference to the checks in the ledger, Exhibit 32, is shown there in red? A. Yes.

(Testimony of Glenn E. Drew.)

Q. And the other items are in black? [42]

A. Yes.

Q. So you can identify them also in addition to the reference to the check number? A. Yes, sir.

Q. Do you know whether, during the first part of 1949, when these five missing checks were issued, the bank account of your agency was in the same bank in which the account was carried after that period?

A. Yes, it was in the same bank and there were no difficulties in reconciliation.

Mr. Avakian: That is all.

Mr. Maxwell: I have no further questions.

(Witness excused.)

DON MELVIN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name? A. Don Melvin.

Q. Where do you reside? A. Reno.

Q. Have you been previously sworn?

A. Yes, yesterday.

Q. What is your occupation, sir?

A. Vice-president and manager of the Business and Professional Collection Service in Reno. [43]

Q. Did you have any transactions with Dr. Wayne P. Kelley during 1949 to 1952?

(Testimony of Don Melvin.)

A. Beginning in 1950, to and including 1952, yes.

Q. You have been asked to bring today your records of those transactions, including cancelled checks, amounts paid to you, and your ledger sheets. You have those records with you? A. Yes, sir.

Q. May I have your cancelled checks and ledger sheets? I note that the checks have paper tapes, transparencies, to them. I wonder if you could explain that?

A. The tape is a recap of our collections paid to our office, gross collections; also cover collections paid direct to the doctor, and then our fee is deducted and the balance is mailed to the doctor. Those onion skins are exact duplicates of the receipt that was issued to the paying patient at that time and the check records and the amount of money that we owe the doctor at the end of that particular month's business.

Q. Is that also reflected on these ledger sheets?

A. Yes, every receipt is numbered and the amount of each check is on the ledger and the amount of each commission and the amount payable to the doctor is on the ledger sheet.

Q. Now I notice you have some of the checks attached to the ledger sheet? A. Yes, sir.

Q. Can you detach those? [44]

A. The reason they are attached to this particular ledger sheet is that our accounting system was changed after 1951. We were not using triplicate receipts in 1951, so instead of onion skin, we have

(Testimony of Don Melvin.)

the name of the patient on the ledger sheet. After we started using onion skins, we did not put the name of the patient on the ledger sheet, merely put the receipt number here. That is why we have onion skins, because the names are all right on it. If you wish to take those off, you certainly can.

Q. Now would you hand me the checks and ledger sheets for the periods 1950 to 1952?

A. '50 to '52?

Q. Yes, sir.

A. Well, I would like to explain this 1950 ledger sheet. During the months April to October, 1950, it so happened that we did not write any checks to the doctor because more patients had paid him direct than had paid us. In other words, he owed us money on this particular ledger sheet. Therefore, there are no checks attached to this because any checks that would have been written by the doctor would have been his money. In 1951, the old bookkeeping system, these are cancelled checks. They correspond with this particular ledger sheet.

Q. And this ledger sheet only goes through 1951?

A. Starts in January of 1951 and continues to 1952.

Q. Does it also contain for 1953? [45]

A. Yes, the cancelled checks, the onion skins, did not go into 1953. They were discontinued.

Mr. Maxwell: I will offer these checks, onion skins and ledger sheets as one exhibit. They also have these recaps on. I will offer those, too. The

(Testimony of Don Melvin.)

ledger sheet has entries on for 1953. They are not offered at this time.

Mr. Avakian: I understand from Mr. Maxwell he is willing to stipulate that all payments represented by these checks likewise are included in the reported income and apparently his purpose in offering them is for the same explanation he made in connection with Exhibits 31 and 32, and if that is the case, I would have no objection to the receipt of these exhibits.

Mr. Maxwell: Yes, that is correct. The exhibit is merely offered to facilitate the identification of specific fees and offered to show reported income.

The Court: Very well, the offer is received, subject to the stipulation, as government's Exhibit 33.

Q. Now, Mr. Melvin, your company then is in the business of collecting delinquent accounts?

A. That is correct.

Q. And they collected delinquent accounts for Dr. Kelley, is that correct? A. That is true.

Q. Do you know how the delinquent accounts were collected? [46]

Mr. Lohse: We object to that on the ground it is not within the scope——

The Court: Objection overruled.

A. Frankly, without having the original card, I would have no idea at this time how old any of these particular accounts were before they were assigned.

Q. Now you received amounts from various patients? A. Yes.

(Testimony of Don Melvin.)

Q. And you have a record then, Exhibit 33, is that a record of the patient's name from *whose* those amounts were received? A. Oh, yes.

Q. And the amounts paid by the patients to you are shown on those records? A. Yes, sir.

Q. Are the names and amounts paid by the patient to Dr. Kelley shown on those records?

A. Yes.

Q. That would be any amounts on accounts turned over to you? A. Yes.

Q. Now how did you issue the checks to Dr. Kelley? In other words, what amounts were paid to Dr. Kelley? A. Do you want the amounts?

Q. No, I want to know the general nature of the amounts.

A. Our collection fees are based upon the size of the account. In other words, for an account of to and including \$50, our commission [47] is 50 per cent of the monies collected. Any account over \$50, the commission rate is $33\frac{1}{3}$ per cent.

Q. Would you turn over to Dr. Kelley his percentage of all the amounts collected by you?

A. Well, maybe I had better start it this way. If we collected, say \$100 for the doctor on several different debtors, the gross collection that we made for the doctor was \$100, and all of these particular accounts were less than \$50, our commission would be 50 per cent.

Q. Let us assume that situation of it.

A. If we collected \$100 for the doctor, we would send the doctor in a check for his share, which

(Testimony of Don Melvin.)

would be \$50. However, had a patient come to the doctor and paid him an account of \$50, the doctor would in turn owe us \$25 on that particular collection he made.

Q. Because he turned it over to you?

A. So that at the end of the month we would balance it out; say he owed us \$25, we owed him \$50, we would send him a check for the difference, which in this case would be \$25.

Q. How would you find out when the patient paid the doctor?

A. The doctor or his girl would call and report to us that so and so made such a payment, and we would run it through our books as a direct payment.

Mr. Maxwell: I have no further questions.

Mr. Lohse: The defendant has no questions, your Honor.

(Witness excused.) [48]

GEORGE RATHMANN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please, sir? A. George Rathmann.

Q. Were you sworn yesterday, sir?

A. Yes, sir.

Q. Where do you reside, Mr. Rathmann?

A. 2203 Plumas Street, Reno.

Q. What is your occupation?

(Testimony of George Rathmann.)

A. Assistant secretary Home Furniture Company in Reno.

Q. Mr. Rathmann, your company has been ordered to bring records of the sale of furnishings to Dr. Wayne P. Kelley, together with records showing method of payment thereof for the period 1949 to 1952. Have you brought those records with you, sir? A. Yes, sir.

Q. May I have them. Do you have anything else beside this ledger sheet?

A. Both sheets, sir.

Q. May I have these? Now, you have handed me two pieces of ledger sheet paper. Can you state what this is?

A. Yes, it is a record of purchases and payments.

Q. Made by whom?

A. By Dr. Wayne P. Kelley. [49]

Q. And for what period, sir?

A. Started in 1946 and up to August, 1948.

Q. Does that contain a record of items of furniture purchased during that period of time?

A. Yes, sir.

Q. Now you have handed me a yellow sheet of paper. What is that?

A. That is a record of charges and credits of Dr. W. P. Kelley.

Q. With your firm? A. Yes, sir.

Q. And for purchases of what items?

A. Well, for various items.

Q. And for what period is that?

(Testimony of George Rathmann.)

A. Starts at 1951 and through January, 1952.

Mr. Maxwell: I will offer these ledger sheets as government's exhibit next in order.

Mr. Lohse: We have no objection to the admission of the ledger sheets.

The Court: The offer will be received in evidence as government's Exhibit 34.

Q. Mr. Rathmann, I see on these first pages here of the ledger sheet that there are three columns, one says Dr., Cr., and Bal. at the top. Would you explain what these entries are, generally?

A. The first column, Dr, is abbreviation for debtor and that means charge to the account. [50]

Q. What do you mean?

A. Something that had been purchased.

Q. And not yet paid for? A. Yes.

Q. And the second column?

A. The second column, Cr, stands for credit, which is payment.

Q. In other words, that is a record of payments?

A. Yes, or a return.

Q. What do you mean by a return?

A. Well, for instance, there was purchase made of several items and one was returned. Put it down for credit.

Q. Can you tell the difference between that and a cash payment?

A. Yes, because it is listed in the information column by the word "credit."

Q. Now, does that same thing hold true with

(Testimony of George Rathmann.)

respect to this yellow sheet, which is the last page of the exhibit?

A. No. On the last sheet of the yellow page this just has the word "charge" and "credit" and the balance.

Mr. Maxwell: No further questions.

Mr. Lohse: The defense has no questions, your Honor.

(Witness excused.)

WILLIAM T. NORRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): Will you state your full name, please? [51] A. William T. Norris.

Q. You were previously sworn here under the name of Tim Norris, is that correct? A. Yes.

Q. Where do you reside, sir?

A. Reno, Nevada.

Q. How long have you resided in Nevada.

A. Ten years.

Q. Where are you employed?

A. Scott Motor Company.

Q. You have been an employee there how long?

A. A year.

Q. You were requested to bring certain records with you by subpoena ducas tecum. Have you brought those records? A. Yes.

Q. I wonder if I may see them. Mr. Norris, you

(Testimony of William T. Norris.)

have handed me a card here dated December 26, 1950, for one new——

Mr. Avakian: Just a moment, please, we haven't seen the statement yet, nor is it in evidence.

Mr. Brown: Simply for identification.

Mr. Avakian: It is in your hand. You know and he knows what it is.

Mr. Brown: I would mark it for identification, document dated December 26, 1950, purporting to be an order——

Mr. Avakian: I think that identifies it without reading [52] the contents.

The Court: The offer will be marked for identification government's Exhibit 35.

Mr. Avakian: Your Honor, we are willing to stipulate to these documents, including the yellow card and invoice.

Mr. Brown: We would like to have the car order, dated December 26, 1950, signed by Wayne P. Kelley, M.D., marked for identification, in evidence.

The Court: Exhibit 35 for identification will be received in evidence on the part of the government by the same number.

Mr. Brown: We offer the invoice of Scott Motors Company, dated 2-27-51, for special automobile, as plaintiff's exhibit next in order.

Mr. Lohse: Oh, there is no objection.

The Court: The offer will be received in evidence as government's Exhibit 36.

Mr. Brown: It should be noted there, in connec-

(Testimony of William T. Norris.)

tion with Exhibit 35, that there is attached thereto receipt No. 13183, 13605.

Q. Now, Mr. Norris, would you tell the Court and the jury what is the purpose of the card here and record as kept by Scott Motors Company?

A. Agreement between purchaser and Scott Motors Company, the purchase order for 1951 Cadillac. [53]

Q. It is signed by the purchaser, is that correct?

A. Signed by the purchaser.

Q. What is the purchase price of the automobile reflected by the car order? A. \$3704.

Q. Does the car order reflect a cash down payment? A. No, it shows the deposit.

Q. A deposit? A. A deposit on it.

Q. That is reflected, is it not, by one of the receipts? A. Yes.

Q. Attached to the order? A. Yes.

Q. In amount of how much?

A. Two hundred fifty dollars.

Q. What is the second receipt that is attached to the order? Would you describe that for us?

A. It is made out to Wayne P. Kelley in amount of \$3,454.

Q. Does that represent the final payment on the automobile? A. Final payment, balance.

Q. Now, with reference to the car invoice, would you explain what is the purpose of the invoice?

A. The purpose of the invoice is to show the final transaction at the time of the delivery of the car.

(Testimony of William T. Norris.)

Q. Does the invoice reflect the total purchase price of the [54] automobile, as it is reflected on the car order? A. Yes.

Q. And what is that figure? A. \$3704.

Q. Briefly, how is that \$3704 broken down, if you can tell by the invoice?

A. Base price was \$3413.55 and the optional equipment totalled \$290.45.

Q. What is the optional equipment, if you can tell?

A. White wall tires, radio, heater and accessories No. B, whatever that is.

Q. You have delivered to me certain photostat copies of the exhibits, have you not? A. Yes.

Mr. Brown: For withdrawal of the exhibits which have been offered in evidence and substitute photostatic copies. You may inquire.

Mr. Avakian: No questions.

(Witness excused.)

Mr. Avakian: Your Honor, we likewise have no objection to withdrawal of the original and substitution of the photostats as the prosecution desires.

JOE HINOTE

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [55]

Direct Examination

Q. (By Mr. Brown): You have been previously sworn, in this matter, have you not?

A. Yes, sir.

(Testimony of Joe Hinote.)

Q. And your name is Joe Hinote? A. Yes.

Q. Where do you reside?

A. 1461 Wright Street, Reno.

Q. You have resided in Nevada how long?

A. Twelve years.

Q. What is your occupation or profession?

A. Automobile business.

Q. And you have been in that business how long?

A. From the time I have been in Nevada and many years prior to that.

Q. What is your present business?

A. Automobile.

Q. Now you were subpoenaed to appear here today, were you not? A. Yes, sir.

Q. And there were certain documents listed upon your subpoena that you were requested to bring with you, is that correct? A. Yes.

Q. Could you briefly describe them?

A. I have the original order and the repair order and copies of memorandums in connection with an automobile purchased from the McCaughey Motors November 27, 1948. [56]

Q. How do you happen to be in possession of those records, sir?

A. I purchased the business of McCaughey Motors and took over the assets of the McCaughey Motors.

Q. These records were a part of the business records that were transferred to you, is that correct? A. Yes, sir.

(Testimony of Joe Hinote.)

Q. You didn't actually make these entries and they were not actually made under your supervision? A. They were not.

Q. You have them simply because of the fact that you were a successor? A. Yes.

Q. Would you hand me the invoice please?

A. Yes.

Mr. Avakian: May we examine the witness on voir dire, with respect to the foundation, particularly in regard to the statement he acquired these records by purchase of the business. I would like to have the invoice marked for identification.

The Court: The offer will be marked for identification as government's Exhibit 37. You may inquire on voir dire.

Q. (By Mr. Avakian): Mr. Hinote, when did you purchase this business?

A. In 1950. [57]

Q. And you personally were not connected with the business prior to that time? A. No, sir.

Q. And you simply acquired this along with other records you received, is that right?

A. Yes, sir.

Q. Do you have any personal knowledge as to the bookkeeping or accounting procedures which were followed in November, 1948, in that business?

A. Yes.

Q. You were there——

A. I wasn't there but I took over the records and we audited.

Q. Perhaps I didn't make my question clear. Do

(Testimony of Joe Hinote.)

you have any personal knowledge, based upon your own personal observations, as to the manner in which the bookkeeping entries were being made by the employees in November of 1948?

A. Not personally, other than the records indicate.

Q. With respect to the manner of payment of the sums shown on this invoice, do you have any knowledge other than what is on the document itself?

A. Well, what is shown in the sales journal.

Q. Do you have that with you?

A. I do not.

Q. I take it you have no personal knowledge?

A. No, sir. [58]

Mr. Avakian: Your Honor, we do not desire to base any objection on lack of foundation. We are more concerned about the matter of whether the matter of payments will be cleared up and I would like, through the Court, to address a question to counsel, whether they intend to follow up on this.

The Court: Very well.

Mr. Maxwell: Well, may it please the Court, first of all this is an asset in the net worth computation. This is an asset of the defendant, purchased during one of the years. Now the matter of purchase I think Mr. Avakian is interested in is whether it was cash or check, is that correct?

Mr. Avakian: The thing I am concerned with is it was transaction in 1948 prior to the years involved in this case and this document, on its face,

(Testimony of Joe Hinote.)

shows a certain amount of unpaid balance, which, without further explanation, would show a liability, which would work to decrease net worth and unless that matter is clarified, it would work to some disadvantage.

The Court: You have offered this in evidence?

Mr. Maxwell: Yes.

The Court: The offer in evidence will be received and the offer will be designated government's Exhibit 37. Now I am just a little confused, so I suggest you proceed and make objection at the proper time.

(Jury admonished and recess taken at 11:00 o'clock.) [59]

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

Mr. HINOTE

resumed the witness stand on further

Direct Examination

Q. (By Mr. Brown): Now referring to the car order, Mr. Hinote, can you, from examining that instrument, tell the jury and the Court what was purchased by Dr. Kelley?

A. This was a Mercury car, Model 72, which was a six-passenger coupe, for the sum of \$2832.

Q. Two thousand eight hundred thirty-two?

A. Yes.

Q. On what date?

A. That was on November 27, 1948.

(Testimony of Joe Hinote.)

Q. Now I note, from examining that instrument, that there is indicated in the right-hand column at the bottom, a balance due of \$1800?

A. Yes, sir.

Q. Does that figure reflect an unpaid balance at that time?

A. That reflects an unpaid balance at the time the order was written.

Q. And this is more than just a purchase order?

A. Yes, sir.

Q. And then there was no unpaid balance that date—can you indicate what the word is there? [60]

A. The word is November 29, 1948.

Q. You have handed me a bill of sale, which we would have marked for identification plaintiff's exhibit next in order, 37(a), your Honor. Now was that bill of sale taken from the same records?

A. Yes sir.

Q. Would you describe the bill of sale to the jury and Court please?

A. Bill of sale is dated November 29, 1948, conveying clear title to Wayne P. Kelley, M. D., for the purchase of this 1949 Mercury.

Q. That is a duplicate copy?

A. That is a duplicate copy from our files when the car was delivered and paid for in full.

Q. Would it be the custom of an automobile business to issue such a bill of sale if there was an unpaid amount due on the automobile?

A. No sir.

Q. Can you determine, from examining your

(Testimony of Joe Hinote.)

records, whether the amounts paid by Dr. Kelley were paid by cash or by check?

A. That I can not do.

Mr. Brown: We offer the bill of sale in evidence as plaintiff's No. 37(a). You may inquire, gentlemen.

The Court: We have been following the practice of using letters for identification. [61]

Mr. Maxwell: Why not include it on our 37?

The Court: Then the offer is received in evidence as a part of Exhibit 37.

Cross Examination

Q. (By Mr. Avakian): Mr. Hinote, from the two documents which you have identified and which are in evidence now as Exhibit 37, are you satisfied in your own mind, from your knowledge of these records, that the full purchase price for this Mercury was actually paid in November of 1948?

A. Yes sir.

Q. And there was no balance due then thereafter?

A. No sir.

Mr. Avakian: Thank you, that is all.

(Witness excused.)

RUSSELL H. WILSON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please for the record?

(Testimony of Russell H. Wilson.)

A. Russell H. Wilson.

Q. Where do you reside, Mr. Wilson?

A. My home is in Piedmont, California.

Q. What is your occupation?

A. I am a stock broker.

Q. For what firm? [62]

A. The firm of Wilson, Johnson & Higgins.

Q. Are you a partner of that firm?

A. I am a partner.

Q. You have been asked to bring today certain records of the account of your company with Wayne P. Kelley and others. Do you have those records with you? A. I do.

Q. Will you kindly tell me what records you have?

A. I have here the ledger sheets which shows Dr. Kelley's transactions with my firm; I have cash deposit tags.

Q. May I have the ledger sheets. Are these the ledger sheets and deposit slips attached to them, is that correct? A. Correct.

Q. And the ledger sheets also have note on them that you were unable to locate certain deposit slips?

A. Yes.

Q. Now did you make a search for those deposit slips? A. Yes.

Q. And you were unable to find them?

A. Yes sir.

Q. Now you have handed me the documents in two distinct classifications. What is this first classi-

(Testimony of Russell H. Wilson.)

fication document? Can you tell me what the account is?

A. Dr. Kelley had two accounts with us.

Q. And this first account is in what name? [63]

A. Dr. Wayne P. Kelley, Mrs. Lois Kelley, James Leighton, Phyllis K. Kelley.

Mr. Maxwell: We will offer this group of ledger sheets and deposit slips pertaining to that account as plaintiff's exhibit next in order.

Mr. Avakian: May we have a moment to examine them?

The Court: Yes, counsel may examine them.

Mr. Avakian: Your Honor, we have no objection with respect to the authenticity as to these documents. We do wish to raise an objection, at least tentatively, to the materiality. I would like to make argument on that objection. I do not know whether the Court would like to hear it in the presence of the jury or the absence?

Mr. Maxwell: It is obviously net worth, was during the years involved, and I do not think there is any question about that.

Mr. Avakian: We would like to make argument on it.

The Court: Very well.

Mr. Avakian: The objection which I wish to make—and as I say, I am making this tentatively—is that I do not believe the proper foundation has been laid at this time as to the presentation in a net worth type of case, because there has been no evidence as yet with respect to the starting point,

(Testimony of Russell H. Wilson.)

which the Supreme Court has said is essential on a net worth case. I believe, in view of the fact that there is no objection raised [64] as to the authenticity of the document, that it would be proper to mark these for identification and to offer them later on, in the event the starting point evidence is presented, but my concern is that if the foundational requirements for the starting point net worth are not met, the introduction of this evidence in the meantime would tend to have some sort of prejudicial effect and my motion to strike might not be sufficient to raise that prejudice, so I would object to the receipt of this evidence at this time, on the ground that the prosecution has not, as yet at least, offered evidence which would tend to establish a starting point, and having failed to do that, the evidence relating to acquisition or sale of assets during the period covered by the case should not be received.

The Court: Objection overruled, with the right on the part of counsel to raise that objection later and at that time the Court will consider a motion to strike. That will be government's Exhibit 38 in evidence.

Q. Now this second group of documents that you have handed me consists of a separate account, does it, from the first group? A. That is right.

Q. In what name is that account?

A. In the name of Dr. Wayne P. Kelley, Mrs. Lois K. Kelley.

Q. And that contains one deposit slip and two

(Testimony of Russell H. Wilson.)

letters, together with an explanatory note in nature of deposit slip and one deposit? [65]

A. That is right.

Mr. Maxwell: I will offer this group as government's exhibit next in order.

Mr. Avakian: Your Honor, may we make the same objection to this on the same basis as to Exhibit 38.

The Court: Very well. It will be the order of the Court that the offer will be received in evidence as government's Exhibit 39, under the same conditions as Exhibit 38, that the defendant may move to strike.

Q. Handing you Exhibit 38, and making particular reference to the yellow ledger sheets, can you explain to me the meaning of the column on that ledger sheet and the entries thereon, generally?

A. Well, starting at the left-hand side of the sheet, first column top——

Mr. Maxwell: May the record show I show plaintiff's Exhibit 39 to the jury at the same time.

The Court: You are exhibiting No. 39 to the jury merely to show it is the same form that the witness is testifying to.

Mr. Maxwell: While the witness explains.

A. Column left at the top, it shows at the top old balance of the account. Going across the page it will show purchases, our receipt for securities. The next column will show what has been [66] sold or delivered and name of the security. Next column will show the price.

(Testimony of Russell H. Wilson.)

Q. Unit price per share?

A. Unit price per share. The next column shows the total amount paid for the security.

Q. That shows total amount paid by you?

A. That is total amount client owes us, or it will also show total amount the debit to the client's account, the amount of money is owed us. Next column is payment to us, and final column is the new balance.

Q. And that balance is the amount the doctor owes you?

A. At varying times that last column will show how much the client owes the firm or the firm owes the client.

Q. But the credit column shows payments, next to the last column?

A. That is right, payments to the firm.

Q. By the client? A. By the client.

Q. In this case Dr. Kelley?

A. Dr. Kelley.

Q. Now with respect to the payments shown in the credit column, do you have any way of telling whether those payments were by cash or by check?

A. Yes, we do.

Q. And what is that means that you have of telling? [67]

A. We have the deposit tag, the duplicate deposit tag, when we make our deposit at the bank.

Q. These deposit tags you have attached to each of these exhibits consists of your duplicate deposit tag, deposit of the firm in its bank account?

(Testimony of Russell H. Wilson.)

A. Yes.

Q. With what bank did your firm do business?

A. We have an account at the First National Bank of Nevada.

Q. And these deposit tags are deposited by your firm in that account? A. Yes.

Q. Now going down to credits in Exhibit 38, what is the first credit or payment shown on your ledger sheet by Dr. Kelley?

A. Credit of fifty-five thousand dollars.

Q. Now when was that paid?

A. On June 23rd when it was entered in the books. Deposited on June 21st.

Q. On June 21st of what year? A. 1950.

Q. You say it was entered in the books as of June 23rd? A. Yes.

Q. And that is shown on your deposit tag by that date?

A. It is shown deposited on June 21st.

Q. Did you make a separate deposit tag for each payment received from your customers? [68]

A. I can't say positively about that.

Q. Did there appear to have been separate deposit tags made for Dr. Kelley?

A. There are a series of deposit tags for Dr. Kelley's account.

Q. Then your deposit tag of June 21st shows payment of 55 thousand dollars by the doctor and your deposit of that amount in the bank?

A. Yes.

Q. How was that amount paid, by check or cash?

(Testimony of Russell H. Wilson.)

A. That was paid in currency.

Q. Now what is the next credit on the account?

The next credit was \$12,909.45, which was by check.

Q. And do you have a deposit tag for that?

A. Yes, there is a deposit here.

Q. Does it show what bank that was written on?

A. First National Bank. 94-4 one check; 1-32 second check.

Q. What was the date of that, that \$12,909?

A. That was on July 25, 1950.

Q. And what is the date of your deposit tag?

A. July 21, 1950.

Q. In the ordinary course of your business, would you deposit such amounts on the same day they were received?

A. Not necessarily with checks.

Q. With cash would you deposit the same day?

A. With cash the same day. [69]

Q. With checks would there be a delay of any substantial period of time?

A. There could be two or three days' delay, particularly weekends.

Q. Nothing like two or three months?

A. Oh no.

Q. Now what is the third payment shown on your ledger sheet in Exhibit 38?

A. We show a cash payment to us of \$5083.83.

Q. What is the date of your entry?

A. That would be July 31st.

Q. Of what year? A. 1950.

(Testimony of Russell H. Wilson.)

Q. And do you have a deposit tag for that amount? A. Yes, I do.

Q. What does that deposit show?

A. That shows currency of \$1420 and two checks drawn on the bank, one 29-7, the other 94-2.

Q. What are the amounts of those checks?

A. \$3,638.83 and \$25.00.

Q. And what is the date of the deposit tag?

A. July 28th.

Q. And the entry was July 31st, I believe you said? A. Yes.

Q. And that is 1950? [70] A. 1950.

Q. And what is the next payment on your ledger sheet? A. \$4,995.50.

Q. What is the date of that?

A. That was on September 25, 1950.

Q. Do you have deposit tag corresponding to that too? A. Yes, I do.

Q. What is the date of that deposit tag?

A. The deposit tag is September 22nd.

Q. And how does that show the amount was paid?

A. It shows currency of \$4,847 and a check for \$148.50 on bank 94-2.

Q. What is the next payment on your ledger sheet?

A. On October 4, 1950, \$475.30.

Q. Do you have a deposit tag for that payment?

A. Yes, I do.

Q. And does it show how that amount was paid?

A. That was paid by check, 94-2.

(Testimony of Russell H. Wilson.)

Q. And what is the next payment received by you?

A. The next is on October 17, cash \$494.70.

Q. Do you have a deposit tag for that?

A. I do, dated October 16, 1950.

Q. And does it show how that payment was made? A. That was currency.

Q. What is your next payment? [71]

A. Next payment to us is \$2,512.98.

Q. The date? A. On November 2, 1950.

Q. Do you have a deposit tag for that?

A. Yes, there is a deposit tag here.

Q. What is the date of that?

A. October 31st.

Q. Still 1950? A. 1950.

Q. How was that paid?

A. That was \$1900 in currency and check for \$587.98 and check for \$25.00, both on 94-2.

Q. And the next payment, sir?

A. The next payment to us was \$996.32.

Q. And your ledger sheet entry?

A. Is November 8, 1950.

Q. Do you have a deposit slip showing how that was paid? A. Yes, I do.

Q. How was that paid and what is the date of the deposit slip?

A. Deposit slip date is November 6, 1950. It was paid by check, bank 94-2, \$996.32.

Q. And your next payment?

A. Next payment was \$26,486.25.

Q. What is the date of that check?

(Testimony of Russell H. Wilson.)

A. That was November 21, 1950. [72]

Q. Do you have a deposit slip for that payment?

A. Yes, I do.

Q. What is the date of your deposit slip?

A. November 20, 1950.

Q. And does your deposit slip show how that was paid?

A. That was paid by check, bank 94-2.

Q. And your next payment received from Dr. Kelley? A. \$12,909.45.

Q. And what was the date of that?

A. Oh, I beg your pardon, sorry, I have the wrong page. The next was \$3995.

Q. The date?

A. And the date was March 20, 1951.

Q. And do you have a deposit slip for that date?

A. That is one of the deposit tags we couldn't locate.

Q. What was the date of that again, sir?

A. That was March 20, 1951. The ledger states it was paid by check.

Q. The ledger states it was paid by check?

A. Yes, sir.

Q. And what is the next amount, sir?

A. Well, there are a series of amounts here credited to Dr. Kelley's account for the sale of securities, but the next payment into the account, that is the last there was on sales of securities. [73]

Q. In other words, you sold some securities for him and the account was credited with the proceeds? A. That is correct.

(Testimony of Russell H. Wilson.)

Q. Now I will show you Exhibit No. 39 and I will ask you, does that show some transactions between Wilson, Johnson & Higgins and Dr. Wayne P. Kelley? A. Yes, it does.

Q. Does it show payments made by Dr. Kelley to them? A. It shows two payments.

Q. What is the first payment, sir?

A. The first is \$1,975 on April 16, 1951.

Q. And you have a deposit tag for that sir?

A. We did not find that deposit tag. The ledger states it was by check.

Q. The ledger states it was by check?

A. Yes, sir.

Q. And what is the next payment under that Exhibit 39?

A. The next payment was \$10,193.75 on May 17, 1951.

Q. Do you have deposit slip on that payment?

A. Yes, I do.

Q. What is the date of the deposit?

A. Deposit was made, it looks like May 16, 1951.

Q. And does the deposit slip reflect how that amount was paid?

A. In currency \$3,260 and by check \$6,933.75; bank 94-2.

Q. Now, Mr. Wilson, I wonder if you would tell us what your [74] firm is, in general?

A. We are stock brokers, members of the San Francisco Stock Exchange. We are dealers in securities and underwriters.

(Testimony of Russell H. Wilson.)

Q. And your transactions with Dr. Kelley were primarily what?

A. They were primarily dealing with the doctor on over-the-counter issues. At that time we were not a member of the Stock Exchange. Our transactions with the doctor were over-the-counter basis.

Q. You bought for the doctor for his account?

A. We sold stocks for the doctor for his account.

Q. Did you hold those stocks for the doctor after the sale?

A. From time to time we would hold securities for safe-keeping for Dr. Kelley.

Q. At other times would you deliver stocks which you purchased to him? A. Yes.

Q. Would your ledger sheets also reflect receipt of dividends?

A. It would reflect the receipt of dividends on issues which were in the transfer when we claimed dividend for him, or where stock was left in the street name.

Q. You might explain street name.

A. That is where a person does not desire to have certificate transferred to their own name; it is endorsed by the former owner and signature guaranteed at the bank or broker and certificate is delivered on that basis. [75]

Q. I will show you Exhibit 26 for identification and ask you if you can tell me what that exhibit is?

A. The original of these deposit tags.

Q. In other words, those are the original of deposit tags enumerated in Exhibits Nos. 38 and

(Testimony of Russell H. Wilson.)

39? A. Yes; these are duplicates.

Q. And the ones in 38 and 39 are duplicates?

A. Yes.

Q. I wonder if you can find the two missing deposit slips in the original slips, one dated March 20, 1951?

A. No, sir, I don't find it here.

Q. Would you refer to your ledger sheet on March 20, 1951 payment and that is in amount of what? A. \$3995.

Q. And does your ledger *sheet what* was received on that date, check or cash?

A. It shows check received.

Q. Now I think the deposit slips generally run one day previous to the payments, do they?

A. The entry in the ledger wouldn't be made until the deposit duplicate reached our San Francisco office.

Q. Here is deposit slip dated March 19, 1951 for \$3450. Would that be part of that deposit?

Mr. Avakian: The amount, if I recall, is different.

Mr. Maxwell: That is correct. [76]

Mr. Avakian: I object to counsel asking leading questions of a speculative nature. It is a different date and different amount than the ledger sheet shows. The ledger sheet shows a payment by one check. I don't see where a deposit tag in a lesser amount could be representing deposit of a single check in a larger amount.

(Testimony of Russell H. Wilson.)

Mr. Maxwell: If it doesn't, I am sure the witness will tell us.

Q. Now we are also on Exhibit 39 missing a deposit tag for what date, sir, and in what amount?

A. The date was April 16, 1951 and the amount was \$1975.

Q. And there is no deposit tag in here for that amount, is there?

Mr. Avakian: What does counsel mean by "in here"?

Mr. Maxwell: Exhibit 26 for identification.

A. There is no tag.

(Jury admonished and noon recess taken at 12:00 o'clock.)

Afternoon Session, March 27, 1956. 1:30 P.M.

Defendant present with counsel. Presence of the jury stipulated.

MR. WILSON

resumes the witness stand.

Mr. Maxwell: You may examine.

Cross Examination

Q. (By Mr. Avakian): Mr. Wilson, I will give you Exhibits 38 and 39, so that you [77] may refer to them if necessary. Now you testified, Mr. Wilson, that Dr. Kelley had two accounts with your firm. One of these was in the name of Dr. Kelley and his wife, is that right?

A. Dr. Kelley and Mrs. Lois K. Kelley.

Q. And the other account was in the names of Dr. Kelley and his wife and their two children?

(Testimony of Russell H. Wilson.)

A. Yes.

Q. That is the only difference between the two?

A. As far as I know of.

Q. These accounts were handled in your San Francisco office or your Reno office?

A. In the office here.

Q. In Reno? A. Yes.

Q. And you are in the San Francisco office, is that right? A. That's right.

Q. And I assume your permanent records are kept there, rather than in Reno?

A. That's right. The bookkeeping is done in San Francisco.

Q. What type of records does Wilson, Johnson & Higgins keep with respect to its customers' accounts?

A. When transactions are executed we send out confirmation, state number of the stock, number of shares, number of securities and extension, that is, the total purchase price.

Q. Is that confirmation mailed from your main office in [78] San Francisco or from your branch office where the business is transacted?

A. It is mailed from San Francisco and there are many duplicate copies of that confirmation; one to the bookkeeping department for the bookkeeper's information. The bookkeeping machine makes the entries. At the end of the month we send every client a copy of the statement for his disposition, as of the end of the month. Our books are audited annually by Ernest & Ernest.

(Testimony of Russell H. Wilson.)

Q. Would you state, for the information of the Court and jury, what Ernest & Ernest is?

A. Certified public accountants.

Q. That is a world-wide accounting firm?

A. Yes.

Q. Do you give any further information?

A. I think that is all.

Q. I notice that you testified that Dr. Kelley had made ten payments to your firm in connection with one of these accounts which is reflected by Exhibit 38 and two payments reflected in the other account, Exhibit 39, a total of 12 payments. Now you stated that you were unable to locate the bank deposit tags on a couple of these transactions. Was a search made in your office for those tags?

A. Oh yes there was.

Q. A total of three out of twelve missing and the search [79] failed to turn them up, is that right?

A. Yes sir.

Q. So apparently those were mislaid or lost or something of that kind?

A. Yes.

Q. You refer to the fact that some of the stock purchased by Dr. Kelley was held in a street name, I think is the term you used. Would you explain again the meaning of that term?

A. Stocks that do not pay dividends frequently are left in what we call street names; that is, the name of the last owner of the stock, the one that issues the stock, and it is endorsed by that owner and the endorsement is guaranteed by the bank or member of the Stock Exchange.

(Testimony of Russell H. Wilson.)

Q. What commonly is the reason for leaving it in that form of ownership, rather than issuing in the owner?

A. To avoid cost of transfer. There might be some very heavy transfer tax involved.

Q. That is, it was a fairly common practice in the brokerage business?

A. It is in some active accounts.

Q. And actually it represents a more convenient and less cumbersome method of purchasing and selling and transferring securities, is that right?

A. That's right.

Q. It is a considerable convenience to you in the brokerage business? [80]

A. It cuts down our bookkeeping, is just as satisfactory. It also permits the client, when he had decided to sell next week, the stock might be back in some transfer office.

Q. So if you receive the order to sell and desire to sell promptly, you can sell more rapidly if the stock is held in a street name than if it were registered in the name of the owner?

A. If you have it registered in the owner, the certificate is on hand. The stock in a street name doesn't require that.

Q. And that frequently means it can be sold more rapidly, isn't that right?

A. There is not much difference if stock is on hand.

Q. Suppose I am one of your hypothetical clients——

(Testimony of Russell H. Wilson.)

Mr. Maxwell: I object to making him an expert witness on this particular phase and asking for his conclusion. He is here to testify to the records we have.

The Court: We started out to get explanation of street name and I think we have it.

Mr. Avakian: I just want to make it clear. The direct examination introduced this idea of not registering this stock in Mr. Kelley's name. I would like to make clear to the jury the convenience involved in using a street name, and it is for that purpose and I would like to complete with one or two questions.

The Court: The Court understands. Let us have the question. [81]

Q. Mr. Wilson, if a client says to sell some securities he owns and in his own name and his possession, they may be in a safe deposit box at the bank, and before you can sell those, he would have to leave his activities or business and go to the safety deposit box to get them personally, whereas, if they were held in a street name, they could be sold immediately, is that right?

Mr. Maxwell: That calls for opinion. No foundation. Assumes facts not in evidence by any stretch of the imagination in this case.

The Court: Objection sustained.

Mr. Avakian: I think that is all.

Redirect Examination

Q. (By Mr. Maxwell): Your clients do not in-

(Testimony of Russell H. Wilson.)

icate to you their purpose for having stocks registered in street names, do they, ordinarily?

A. No.

Mr. Maxwell: That's all.

(Witness excused.)

HOWARD A. BENNETT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, please? A. Howard A. Bennett.

Q. Where do you reside, Mr. Bennett? [82]

A. I live in Oakland, California.

Q. What is your occupation, sir?

A. I am secretary to Mr. Van Strum of Van Strum & Towne Investment, Inc.

Q. Do you have anything to do with Technical Fund?

A. Van Strum & Towne Investment Inc. manages Van Strum & Towne Fund Inc., which is, I will not say successor, but a new designation for Technical Fund.

Q. And the Technical Fund is incorporated and is a corporation?

A. It is a mutual investment fund, or was the Van Strum & Towne Fund, just the same.

Q. Then can you explain a little bit what a mutual investment company is?

A. Well, it is a corporation, whose business is

(Testimony of Howard A. Bennett.)

the holding of securities of various corporations in America.

Q. And does the corporation itself issue shares and sell stock? A. Yes, it does.

Q. Now you were asked to bring today records pertaining to the ownership of shares in Technical Fund, Inc., by Dr. Wayne P. Kelley. Did you bring those records?

A. I have such records as requested.

Q. Did you also bring checks in payment of dividends? A. I brought checks.

Q. Then I wonder if you would give me the checks for dividends on the account. Now you have handed me two different groups of [83] checks, both of them having Technical Fund Inc. at the top. Can you tell me the difference between the two?

A. Yes, one here in Mrs. Kelley's name——

Q. And this first group of checks which you have handed me, in what name do they appear?

A. Mrs. Lois K. Kelley, Wayne T. Kelley, James Leighton Kelley, as joint tenants.

Q. And these represent dividends paid to Dr. Kelley, or to the persons named as payees on the check? A. That is right.

Q. For the period 12-30-1951 to 12-30-1952?

A. Yes sir, they do.

Mr. Maxwell: I ask that these be marked government's next in order and offer them in evidence.

The Court: Do you offer both groups of checks together?

(Testimony of Howard A. Bennett.)

Mr. Maxwell: No, your Honor, I am going to offer the other group separate.

Mr. Avakian: We have no objection, your Honor.

The Court: The offer will be received and marked Exhibit 40 on the part of the government.

Q. Now the second group of checks which you have handed me, are they all in the name of Wayne P. Kelley?

A. And Mrs. Kelley. Some of them have the children on and one has Mrs. Phyllis Kelley on it.

Q. Phyllis I. Kelley? A. Phyllis I. Kelley.

Q. Are they payable to different persons?

A. No. According to the records, I was able to determine the way which this dividend came in. There was a confusion the way the dividend came in on the shares on which the dividend was determined and in the case of the Phyllis check for \$10, we deposited the check to Phyllis and Wayne Kelley, et al. That is out of the dividend of Wayne P. Kelley.

Mr. Maxwell: I offer this group of checks as government's next in order.

Mr. Avakian: Your Honor, with the exception of the check to Mrs. Phyllis I. Kelley, we have objection to her. As to that, we object on the ground no proper foundation laid to admit that check in this case.

The Court: The dividend check?

Mr. Avakian: Yes. We are not concerned about the ten dollars but possible implication that might be drawn from it and until proper foundation is

(Testimony of Howard A. Bennett.)

laid we would object to that; otherwise, we have no objection to the rest.

Mr. Maxwell: I think the witness testified in the name of Phyllis I. Kelley in error.

A. I have a subsequent check, \$852.50, which covers the \$10 plus \$843.60.

Mr. Avakian: Where is that check? [85]

A. It is a copy of our dividend accountings. We are getting into another subject.

Mr. Avakian: I think that makes it all the more clear this check is immaterial, should not be admitted in this group.

The Court: Well, it is difficult. Objection overruled.

Mr. Maxwell: May I point out the \$843.60 is right on top of the checks.

Mr. Avakian: I understood he had a different check.

A. I have a large group. I do have subsequent check.

Mr. Avakian: It appears the \$10 is included in the \$843.60 and would be erroneous duplication.

The Court: That is my understanding, counsel; the record is clear on it.

Mr. Avakian: Thank you.

The Court: The offer will be received in evidence as government's Exhibit 41.

Q. Did you bring some other checks?

A. Yes, I have checks on what is called Technical Fund Distributors.

Q. What are those checks?

(Testimony of Howard A. Bennett.)

A. Now we get into the subject of reinvestment on this. Dr. and Mrs. Kelley's reinvestment of their dividends and disbursed into additional shares as dividends became available and when [86] the dividends were accumulated at the end of the quarterly period, they were issued additional shares and there was always a certain amount which would be less than a share and a check was issued for that.

Q. What was left over from investment of dividends? A. That is correct.

Q. First, sir, give us the authorization of Dr. Kelley and Lois Kelley to make the reinvestment of the dividends. Do you have those with you?

A. I have some photostatic copies of records in the bank.

Q. These are in the Crocker National Bank?

A. That is correct.

Q. Did the Crocker Bank make the photostat?

A. They did.

Q. They handed to you these photostats?

A. That is correct.

Mr. Avakian: We have no objection as to the authenticity, your Honor.

Mr. Maxwell: I will offer these as government's Exhibit next in order.

The Court: What do you mean by "these"?

Mr. Maxwell: They are dividend reinvestment orders issued to the Technical Fund and Technical Fund Distributors and signed by the owners of the shares, Wayne P. Kelley, Mrs. Lois K. Kelley, etc.

(Testimony of Howard A. Bennett.)

The Court: That was the authority given to the firm by certain of the Kelley family, authorizing reinvestment?

Mr. Maxwell: Yes, distribution of additional shares.

Mr. Avakian: We have no objection to these being received in evidence, your Honor.

The Court: The offer will be received in evidence as government's Exhibit 42.

Q. Now then, as I understand it, you reinvested these dividends paid to Dr. Kelley and the other account holders during the years 1950, 1951 and 1952? A. That is correct.

Q. And in that investment you have the fraction left over; in other words, the share would be so much and the dividend wouldn't come out even?

A. That is correct.

Q. And these individual checks which you have are the checks for the fractions?

A. That is right.

Q. May I have those please? These are broken down in accordance with account of Lois K. Kelley, Wayne P. Kelley, James Leighton, one account, and the other account, Wayne P. Kelley, James Leighton and Lois K. Kelley, the only difference between the two is that Mrs. Lois K. Kelley comes first on one and Wayne P. Kelley comes first on the other? [88] A. That is correct.

Mr. Maxwell: I will offer these two groups of checks as government's exhibit next in order, one

(Testimony of Howard A. Bennett.)

pertaining to Lois K. Kelley as the first exhibit, your Honor.

Mr. Avakian: We have no objection to these. I do not recall in what order. One group has the name of Wayne Kelley and the other Lois Kelley.

Mr. Maxwell: Lois Kelley first.

The Court: The group of checks in the name of Lois Kelley will be received as government's Exhibit 43. Check in the name of Wayne Kelley as first in order, will be received in evidence as government's Exhibit 44.

Q. Now, Mr. Bennett, have you brought with you today copies of your purchase orders; in other words, orders for purchase of stock?

A. Yes; I might point out the ones that are my brokers.

Q. But they are out of your original records?

A. They are out of my original records.

Q. May I have those orders. You have handed me actually two separate groups of these. You have them separated by brokers?

A. Yes, this order of July 24, 1952 was made through George McKaig & Company. These others are my brokers, Wilson, Johnson & Higgins.

Mr. Maxwell: I will offer these purchase orders as [S9] government's exhibit next in order.

Mr. Avakian: We have no objection to these, your Honor.

The Court: They will be received as government's Exhibit 45 in evidence.

Q. Now, Mr. Bennett, do you also have any doc-

(Testimony of Howard A. Bennett.)

uments which show the number of shares purchased in consequence of the reinvestment of dividends?

A. We have the history of the account which are in the files of the Crocker National Bank, their ledger sheet and shows the shares.

Q. They show acquisition of shares as made?

A. They do not differentiate between those reinvested and those that are outright purchase.

Q. For what period? A. These ledgers?

Q. Yes.

A. One begins on June, 1950 and the last date here, showing the balance of June, 1953.

Q. May we take these apart?

A. You may. This second account starts in November of 1952.

Q. Will you place them in proper order? Where did you secure these photostats, Mr. Bennett?

A. From the Crocker Anglo National Bank.

Q. And the Crocker Anglo National Bank keep them as part of their records and part of your records? [90]

A. They were, and are, custodian of the records.

Mr. Maxwell: I will offer these two groups of photostatic copies of ledger sheets, first one starting with the name of Lois K. Kelley and second starting with name of Wayne P. Kelley. May I amend my offer to exclude any entries on those sheets which might relate to the year 1953.

The Court: Very well, the offer of photostats, beginning with Lois K. Kelley first in order, will be received in evidence as government's Exhibit 46.

(Testimony of Howard A. Bennett.)

The group having the name of Wayne P. Kelley first in order will be admitted as government's Exhibit 47, subject to the restriction stated by counsel.

Mr. Avakian: May I make this inquiry? May it be understood, with respect to all of this information, we may have the right to move to strike, as was the ruling of the Court in connection with prior offers, and not have to make objection each time.

The Court: The motion, of course, can be made by counsel at any time he sees fit.

Mr. Avakian: I just want it understood that, in view of your Honor's ruling on the beginning group of exhibits, that related type of evidence, I wanted to make it clear in the record that they are going in in deference to that ruling and we would like to reserve the right to strike out any of the [91] evidence of this type.

The Court: It is the understanding of the Court that you have reserved the same objection to the same type of proof.

Mr. Avakian: Thank you, your Honor.

Q. Mr. Bennett, you have some more documents, showing the reinvestment of dividends in shares, such as perhaps carbon copies of papers?

A. Yes, I have the copy of checks sent out to the Technical Fund Distributors. I am missing two copies, that would be the two orders.

Q. May I have those. First, would you explain what information is on these sheets?

(Testimony of Howard A. Bennett.)

Mr. Avakian: Your Honor, may we see them first?

Mr. Maxwell: I just want to find out what they are, but I do not want the witness to read anything, just general information.

A. These show amount of dividend and price at which the reinvested new shares would be carried per share and total and the last figure indicates the excess amount.

Q. And that refers to the checks that go back to the fraction checks, is that correct?

A. That is correct.

Mr. Maxwell: At this time I will offer in evidence Technical Fund papers as described by the witness, showing information as to reinvestment of dividends. [92]

Mr. Avakian: We have no objection to these being received in evidence, reserving our right to strike.

The Court: The offer will be received in evidence as Government's Exhibit 48.

Q. Now, Mr. Bennett, do your records which you produce here in court, Exhibits 40 to 48, do they show the amount of stock purchased by Dr. Kelley or his wife, in dollars and cents, during the year 1949?

A. There were no transactions in 1949.

Q. During the year 1950?

A. Yes, sir, the sales and the other duplicates indicate the reinvested value.

Q. Let us break this down to an original invest-

(Testimony of Howard A. Bennett.)

ment which came from the stockholders.

A. That is correct.

Q. And the reinvestment of dividends from the original investment, is that the way it was?

A. The reinvested shares originate from the dividends and distributions, yes.

Q. First, can you look at your records and tell me the amount of purchase, original purchase, in 1950?

A. Do you wish that in total amounts or in orders?

Q. Total amount. The total cost of original purchase of Technical Fund stock by Dr. Wayne P. Kelley and Lois K. Kelley in the account for the year 1950. [93]

A. In the two accounts, that is, Wayne P. Kelley and Lois K. Kelley and Lois K. Kelley and Wayne P. Kelley, there were 8640 shares, at a cost of \$79,880.92.

Q. Now what did the doctor receive in the way of dividends during that year?

A. By the doctor, you mean in both accounts we are referring to?

Q. Yes, sir.

A. There was a total distribution of \$4,697 for the year ended 1950.

Q. Of that amount, how much was reinvested?

A. \$4,676.86.

Q. Then at the end of the year do you have the doctor's total investment in Technical Fund stock, cost value?

(Testimony of Howard A. Bennett.)

A. Speaking in dollars, his purchases and his reinvestments for the year totals \$84,557.78.

Q. Now for that year on the dividends, were the dividends wholly from income of the corporation, or were they in part a capital gain, that is, dividends resulting from this sale of stock by the company? A. Speaking of 1950?

Q. Yes, sir.

A. Of the total \$4,697, \$3,998.20 was what we call from so-called income or investment, and the \$698.80 was dividends from capital gains, a \$198 gain. [94]

Q. Now I notice there was some \$21 dividends received in 1950 which were not reinvested, is that right?

A. \$20.14 was not reinvested.

Q. And what happened to that money?

A. Those are the checks which we have just seen. They were cashed.

Q. Were all those checks cashed?

A. All which checks?

Q. Well, speaking of the checks for the fraction of the leftover shares.

Q. Are we speaking for all years now?

Q. Yes, Exhibits 43 and 44.

A. No, in some cases, not in 1950 but in the other two years, those fractions were sent in with supplemental orders to make up one share.

Q. So in some cases those checks would be returned, together with additional funds?

A. That is correct.

(Testimony of Howard A. Bennett.)

Q. Did that happen in 1950?

A. That did not happen in 1950.

Q. In the year 1951, at the end of that year, can you tell me how many shares of stock of Technical Fund, Inc. were held by Dr. Kelley?

A. I will have to do some adding here. I have my 1951 figures separate from 1950. [95]

Q. Will you give me just the amounts acquired first during the year 1951.

A. For 1951 there were 4425 shares, totalling \$45,088.05 purchased and 491 shares are reinvestment, dividend distribution.

Q. There was an additional 491 shares?

A. Yes, as result of reinvestment of dividends.

Q. How much was the investment of those?

A. \$4564.33.

Q. And then what would be the total amount the doctor invested in Technical Fund stock in the year 1951? A. \$49,652.38.

Q. Now were there any sales during 1951 of 1950 stock, which I think you said was \$84,557.78?

A. There were no sales in 1950, no sales in 1951.

Q. This 49 thousand would be additional to that amount, is that correct? A. That is correct.

Q. What was the total amount of dividends in 1951? A. \$4,557.83.

Q. And how much of that was invested. I think you said some \$4,568.33 invested, is that correct?

A. That is correct figure from the account, but out of the dividends of \$4,557.83, \$4,541.32 was re-invested and \$21.01 was added to the dividend.

(Testimony of Howard A. Bennett.)

Q. \$21.01, that would be the fraction checks, plus additional [96] amounts, is that correct?

A. That is right.

Q. And how much of the dividends which were paid in, \$4557.83, were so-called income and how much were capital gain?

A. \$2155.68 were dividends from investments income, or so-called income, as you call it, and the dividend from capital gains on sales of the securities by the company was \$2402.15.

Q. Now let us go to 1952. How many shares were purchased during 1952?

A. 2,575 were purchased from George McKaig, previously mentioned, for a total of \$25,003.25.

Q. Were there any sales during the year 1952?

A. There were no sales.

Q. So this would be in addition to the amount purchased in the years 1950 and 1951?

A. That's right. Now we have mentioned just the purchases.

Q. Yes, that is correct. Then what were the dividends? How many shares were purchased by reinvestment dividends?

A. On both accounts there were 671 shares, totaling \$6,001.93.

Q. And that would give you the total amount of purchase for the year 1952 of how much?

A. \$31,005.18.

Q. What was the amount of dividends paid during the year 1952?

A. Dividends and distributions totalled \$5,970.48.

(Testimony of Howard A. Bennett.)

Q. And were those dividends all used to reinvest in stock shares?

A. Yes, the bulk of them were.

Q. I notice those are less than the value of investment.

A. Well, there was \$31.45 that was added to the dividend.

Q. In that year the total of all the dividends was used to purchase shares, plus \$31.45?

A. That is correct.

Q. Of the dividends of \$5,970.48, how much was ordinary income? A. \$2635.02.

Q. And how much was capital gains?

A. There were no capital gains.

Q. Now you have dividends of \$5970.48; ordinary, \$2635.02, what were the balance?

A. Well, the balance of \$3335.46 was distribution of paid-in surplus.

Q. Where do you get your information with respect to the difference in dividends and amounts between ordinary income and capital and distribution of paid-in surplus?

A. On a per share basis, as a matter of record. I also have the quarterly per share amount distributed.

Q. You have this as a portion of your record which shows the break-down between these different items of the dividends?

A. Yes, I have copies here. Working backward, we have at the conclusion of 1952, same as of 1951, I couldn't find the one [98] for 1950, however, I

(Testimony of Howard A. Bennett.)

have a copy of the quarterly report that does give the amounts for the last two quarters of 1950.

Q. May I have those? Do you recall when the first purchase of stock was in these accounts?

A. According to my records, in June, 1950 — June 21, 1950.

Q. Then would any of these statements prior to the one of September, 1950, have any application?

A. No. The purchases in June of 1950 were after the stock record date and therefore Dr. and Mrs. Kelley got no dividends for the end of June, 1950.

Q. The first dividends would be September?

A. That is correct.

Mr. Maxwell: I will offer these, showing dividend distribution for the latter end of the year 1950 and for the years 1951 and 1952.

Mr. Avakian: We have no objection.

The Court: The offer will be received in evidence as government's Exhibit 49.

Q. Mr. Bennett, you said something about paid-in surplus. The 1st dividends of 1952 are ordinary income. Would you explain that?

A. Paid-in surplus is return of investment, as far as the corporation goes. The ultimate result is a reduction of the shareholder's share cost at that time.

Q. In other words, distribution of capital of the corporation of stock? [99]

A. That is correct. That is return of capital.

Mr. Maxwell: I have no further questions.

(Testimony of Howard A. Bennett.)

Cross Examination

Q. (By Mr. Avakian): Mr. Bennett, I believe you have Exhibits 40 to 48 before you, is that correct, all the exhibits you presented?

A. I have——

Q. Let me give you 49 also. I wish you would refer to Exhibit 40, a group of dividend checks.

A. Yes, I have 40.

Q. Will you examine the endorsements on those checks? Would you tell me, from your examination, if it is true that those were all reinvested by either returning the checks to your company or leaving them with you?

A. May I remove the staple on these to examine the endorsements?

Q. Is that necessary? See if you can do it without.

A. Yes, these here, for instance, Exhibit 40, were not.

Q. So the checks were, in fact, deposited by the Kelleys in their own bank account, is that correct?

A. They went back to the Crocker Bank, so then the bank handled each for reinvestment.

Q. That is also true of checks in Exhibit 41, is it not, Mr. Bennett?

A. That is correct.

Q. Referring now to Exhibit 43. I believe you testified the [100] checks in that group represented the fractional portions of the dividends which were not used in purchasing shares because there was a little bit left over?

A. That is correct.

(Testimony of Howard A. Bennett.)

Q. Would you examine the checks in that group?

A. Speaking of Exhibit 43?

Q. Are those the checks in which Lois Kelley's name is shown?

A. That is Exhibit 43.

Q. Would you examine the checks, beginning with April 3, 1951 and running through to December 30, 1952, and tell me if it is not true that those were likewise returned directly for reinvestment?

A. Which ones did you wish?

Q. I believe April 3, 1951 is the first one in the category I mentioned.

A. The first one is January 16, 1951.

Q. Beginning with April 3, 1951.

A. That is right. April 3rd is for 13 cents. That indicates reinvestment here.

Q. And all of the rest of the checks subsequent to that date, running to the end of 1952 in that exhibit, likewise were returned for reinvestment, were they not?

A. I will have to refer to the year.

Q. Would it help you to look at the endorsement?

A. Not necessarily. This one is for 56 cents, the end of June. That was cashed.

Q. What date is that?

A. The end of June, 56 cents; it was cashed.

Q. What year? A. 1951.

Mr. Maxwell: What exhibit are you referring to?

A. Exhibit 43. We started out with the second check, 13 cents, in April.

(Testimony of Howard A. Bennett.)

Q. I direct your attention to the next check, January 8, 1952.

A. Yes, that was sent back with supplemental amount.

Q. Will you look at all the remaining checks for 1952? A. That is correct.

Q. Those were all reinvested?

A. Yes, in 1952.

Q. Would you look at 1952 checks in Exhibit 44, which are checks on which Wayne's name appears first, and tell me whether those were all reinvested?

A. Yes, March 31, 1952, in amount of \$4.06, was handed for reinvestment, as was June 30th for 20 cents, September 30th for \$5.00, a year end one, \$2.09.

Q. January 8, 1952, also?

A. Yes. That actually results from the end of the year 1951, and that was also reinvested.

Q. Now with regard to the purchases which were made in each of these years—first, did you give a total number of shares and [102] total number of amounts—the amount purchased in 1952 was purchased through George McKaig Company, is that right?

A. We have the orders here yes, 2575 shares were purchased through George McKaig Company.

Q. As to 1950 and 1951 purchases, those were made through Wilson, Johnson & Higgins, were they not? A. That is correct.

Q. And the money came to you through that brokerage firm? A. That is correct.

(Testimony of Howard A. Bennett.)

Q. That wasn't money coming directly from Dr. Kelley? A. No.

Mr. Avakian: Your Honor, so there will be no confusion, I would like to call the jury's attention to the fact that the amounts of money specified in the exhibits relating——

Mr. Maxwell: He can argue the case.

Mr. Avakian: There are large amounts floating around here and that is improper——

Mr. Maxwell: I object to the remarks of counsel.

The Court: This testimony was offered and you did not make an objection at that time. I do believe it is out of place to exhibit an argument to the jury.

Q. Now, Mr. Bennett, I wasn't able to follow exactly the addition which you gave in your direct examination. Would you refer to your records, I believe they are in Exhibit 48, which [103] show the purchase in 1951, and particularly to the dividends and to the shares purchased with dividends.

A. I have Exhibit 48 in front of me now.

Q. Do you have the data in regard to the year 1951? Perhaps you may have been using other memorandum in your possession.

A. I might call attention to the fact that these copies in Exhibit 48 are duplicates or triplicates, referred to in the exhibits.

Q. Would you refer specifically to the amount of dividends for 1951 and the amount of shares purchased by reinvestment through dividends in 1951, and perhaps I can straighten out my views.

(Testimony of Howard A. Bennett.)

A. What do you wish me to refer to now?

Q. What is the total amount of dividends for that year?

A. For the year ending December 31, 1951, \$4,557.83 of dividends and distribution.

Q. And what was the amount of money reinvested?

A. \$4,541.32, plus supplemental \$23.01.

Q. Thank you very much. Referring again to Exhibit 48, you stated that there were sheets for two quarters missing?

A. That is correct.

Q. You didn't give the description of sheets missing. What type of sheets are they?

A. They are the duplicate or triplicate entitled, "Dividends to Reinvest," with a couple of checks in Exhibits 44 and 43.

Q. Have you made a search, or had a search made, in your office? [104]

A. I looked for them. I compiled the information myself.

Q. Those two were lost and missing?

A. Those two I couldn't find.

Q. And I take it you made an extensive search for them to satisfy yourself there was no point in looking further?

A. That is correct.

Q. You also talked about not being able to find the tax status form for 1950?

A. That is correct.

Q. That is with respect to Exhibit 49?

A. I did see the quarterly forms, which were broken down.

(Testimony of Howard A. Bennett.)

Q. But you did find those forms for 1951 and 1952, but could not find them for 1950?

A. I could not.

Q. So that is another document which you lost?

A. That is right.

Q. With respect to the distribution of paid-in surplus in 1952, I believe you said the amount of that was \$3335.46? A. Yes.

Q. Is it true, Mr. Bennett, that payment of that amount in the form of a dividend—

A. I called it a distribution, sir.

Q. I think you are right. The payment of that as a distribution represents a tax-free return of capital to the investor?

A. May I read that portion out of the tax form? It may make it [105] clear.

Q. That is part of 49? A. Yes.

Q. If you please.

A. It says: "The amounts shown in the last column were distributions from paid-in surplus. Since they therefore are to be considered a return from capital they are non-taxable, and do not have to be included in Form 1040."

135

Redirect Examination

Q. (By Mr. Maxwell): Mr. Bennett, about how many records, pieces of paper, did you bring here this morning? A. That would be a guess, sir.

Q. Well, make your best guess.

Mr. Avakian: Your Honor, they are in evidence, he can count them.

(Testimony of Howard A. Bennett.)

The Court: He is trying to.

Q. About how many pieces of paper did you bring?

Mr. Avakian: Your Honor——

The Court: Let us just hear.

A. I am a poor guesser, but I would say the pieces of paper I have here, including torn off slips, are 250.

Q. And there are three of them missing, it is my understanding? A. Yes.

Mr. Maxwell: That's all. [106]

Recross Examination

Q. (By Mr. Avakian): Is that a fair norm for your organization?

A. Yes, sir, we are successors of Technical Fund——

Mr. Maxwell: The Internal Revenue didn't have them.

Mr. Avakian: What was your answer?

A. I didn't answer.

Mr. Avakian: I would like an answer.

A. I don't know. I will not say they are lost; I will say I couldn't find them.

Q. Did the Internal Revenue Service examine these records in your office prior to your coming?

A. Not in my office.

Q. You don't know whether they did examine them?

A. No, they have never examined any of these records until today, when I reported.

(Testimony of Howard A. Bennett.)

Mr. Maxwell: I did examine them though today?

A. This morning.

(Witness excused.)

(Jury admonished and afternoon recess taken
at 2:55 p.m.)

3:10 P. M.

Defendant present with counsel. Presence of the
jury stipulated.

GEORGE B. McKAIG

a witness on behalf of the plaintiff, being duly
sworn, testified as follows: [107]

Direct Examination

Q. (By Mr. Maxwell): Will you state your
name? A. George B. McKaig.

Q. Where do you reside, Mr. McKaig?

A. Half way between here and Reno.

Q. What is your occupation, sir?

A. Right now it is nothing.

Q. What was your occupation during 1950, 1951
and 1952? A. Investment broker.

Q. Mr. McKaig, did you purchase for Dr. Kelley
some shares of Technical Fund stock?

A. Yes, sir.

Q. Do you have a memorandum of that purchase? The witness has handed me a yellow sheet containing confirmation and statement in the name of George B. McKaig & Company, dated July 24, 1952. I will ask that that be marked for identification.

(Testimony of George B. McKaig.)

The Court: It will be marked plaintiff's Exhibit 50 for identification.

Mr. Avakian: We have no objection to this going in evidence, your Honor.

Mr. Maxwell: We offer it.

The Court: It will be received in evidence as government's Exhibit 50.

Q. Showing you government's Exhibit 50 in evidence, Mr. McKaig, can you tell us what that means? [108]

A. This is a statement of the Technical Fund purchase of 2575 shares at \$9.71 per share.

Q. What is the total amount?

A. \$25,003.25.

Q. Did Dr. Kelley pay you that amount of money? A. He paid me that in cash and check.

Q. Do you recall how much the currency was and how much check?

A. I haven't my bank accounts here, statement here.

Q. Did you make a deposit of that amount of money in your bank account on or about that date?

A. Yes.

Q. That would be July—— A. July 24th.

Q. 1952? A. Yes, sir.

Mr. Maxwell: I have no further questions.

Cross Examination

Q. (By Mr. Avakian): What was the name of the bank in which you deposited this money?

A. I carry accounts in two banks, but I think this was the Nevada Bank of Commerce.

(Testimony of George B. McKaig.)

Q. In Reno? A. Yes.

Q. Where was your other account?

A. First National. [109]

Q. In Reno? A. Yes.

Mr. Avakian: That is all, your Honor.

Redirect Examination

Q. (By Mr. Maxwell): Do you remember whether or not there was a refund made on this purchase of stock? A. I do not know.

Q. You don't remember; all right. I think that is all.

(Witness excused.)

MRS. BESSIE M. TRACY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): Mrs. Tracy, will you state your full name for the purpose of the record please? A. Bessie M. Tracy.

Q. Where do you live?

A. Part of the time in Florida and part of the time in New York State.

Q. Were you at one time known as Bessie M. Barbour? A. Barbour.

Q. That was your former name or your maiden name? A. That was my former name.

Q. And you had that name during what years, do you remember?

A. Well, I think about 1936 I married Dr. Tracy.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Now you appear here pursuant to a subpoena issued by me, do [110] you not? A. Yes, I do.

Q. Mrs. Tracy, you are acquainted with Dr. Wayne P. Kelley, are you not?

A. Yes, I am very well acquainted.

Q. And you recognize him here in court, do you not?

A. Well, he doesn't look like the same person.

Q. That is the person sitting at the end of the table. You were at one time related to the doctor, is that correct? A. He married my daughter.

Q. Do you recall when you first met the doctor?

A. Yes, I do.

Q. When, to the best of your recollection?

A. Well, he met my daughter——

The Court: I think the witness misunderstood.

Q. Do you recall when you first met the doctor, to the best of your recollection?

A. You mean what year?

Q. Yes.

A. Well, three or four years before 1929, somewhere around there, maybe four or five.

Q. Just to the best of your recollection.

A. Yes.

Q. Did he come to your home on occasion?

A. Oh, yes, very, very often. [111]

Q. Will you explain to the jury and to the court approximately how often he would come to your home?

A. Well, in the first few years, when my daugh-

(Testimony of Mrs. Bessie M. Tracy.)

ter was a student at high school, he used to come twice a week.

Q. Where was this?

A. In Hamilton, New York.

Q. And this was in the years before he married your daughter? A. Yes.

Q. Do you recall what the doctor was doing at that time? A. He was in Colgate University.

Q. Were you acquainted with the doctor's family? A. Yes.

Q. Where did they reside?

A. About six or seven miles, a few miles, out of Hamilton in a small suburb called Hubbertsville.

Q. Do you recall whether they lived in the city or in the country?

A. They lived in the country.

Q. Can you describe their home? Was it a farm? A. It was a farm, yes.

Q. Do you know how large it was?

A. No, I don't. I don't know the exact size.

Q. Do you recall what they raised on the farm?

A. I don't recall they raised anything at the time. I think they kept some cows. [112]

Q. Did they have any hired help?

A. Well, not that I know much about. I don't think so.

Q. Do you recall having visited the farm on occasion? A. Yes, very often.

Q. Do you recall what years this was?

A. It was before my daughter married and afterwards for a short time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. When was your daughter married?

A. She was married Christmas Day in 1929.

Q. Did you keep in contact with your daughter and the doctor after they were married?

A. Oh, yes, they lived with me part of the time.

Q. How long did the doctor and your daughter remain married, to the best of your recollection?

A. Well, I think the children were about three or four years old—from 1929—I think the children were three or four years old; I can't tell the years.

Q. Do you recall how long after they were married the first child was born? Was it several years?

A. He finished Johns Hopkins, took about three years, and a year intern—it was the year the oldest child was born, so that would be around——

Q. Let me see—was the doctor going to medical school when your daughter married him?

A. Yes, he had completed one year and half of the next. Perhaps [113] not half, but I think the first vacation time.

Q. Do you recall how many years he went to medical school? A. Four.

Q. And the oldest child was about four when the parents were separated, is that your testimony?

A. Yes.

Q. That would make it about 1936 or '37, is that correct? A. I think that is right.

Q. I don't want to put the words in your mouth.

A. I am going to correct that. I believe they didn't separate until after '38. It was after Dr. Tracy died, so I think it was around '38 or '39.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Then it was up until this time that you were in close contact with the family?

A. That's right.

Q. Do you have any personal knowledge of the financial status or the ability, financial ability, of the doctor during the course of the marriage, during the period of the marriage?

A. During the time my daughter was his wife, do you mean?

Q. Yes, do you have any knowledge of his financial status at that time?

A. Well, at the time he was in college——

Mr. Avakian: May that be answered yes or no?

Q. Just answer whether you know or don't know. A. I do know. [114]

Q. Did you on occasion lend him money?

A. Yes, I did.

Q. Would you explain to the jury and to the Court the occasion, or upon what occasions, you lent him money, to the best of your recollection now.

A. Well, I really can't define the times that I loaned him money, because it was just continuously. For the fact of the matter, I gave him and my daughter a regular allowance, beginning the year after they were married in 1929 and beginning the next October, when he went back to school, that next year I gave them a regular allowance during his whole college course at Johns Hopkins University, and they also stayed with me part of the time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. What was the reason for your giving him an allowance?

A. Because they had no finances; they had no way of going through school. They didn't have help.

Q. Now you have certain records of financial transactions with the doctor, do you not?

A. Well, I believe I have some letters that he wrote me, asking for financial assistance.

Q. And these letters have been where over this period of years? A. In my own safe.

Q. Until they were delivered to me last night?

A. That's right.

Q. Mrs. Tracy, I show you what purports to be an envelope [115] addressed to Mrs. F. T. Barbour, Hamilton, New York, and I ask you if you can identify that? A. Yes, I can.

Q. Is the letter dated?

A. No, it isn't, but the envelope is.

Q. Is that the letter that was in the envelope that I have handed to you when it was delivered to you? A. Yes, it is.

Q. Can you see the postmark on it?

A. Yes, I can.

Q. What date is it postmarked?

A. February 1, 1930.

Q. And where is it postmarked?

A. Postmarked Baltimore, Maryland.

Q. By whom is the letter signed?

A. "Lot of love, your son."

Q. Is there any other name? Can you identify

(Testimony of Mrs. Bessie M. Tracy.)

the writer? A. Oh, yes.

Q. Who is the writer? A. Wayne Kelley.

Q. Do you have any other sons? A. No.

Q. Any other son-in-law? A. No.

Mr. Brown: We would like to have this marked for [116] identification as plaintiff's exhibit next in order.

Mr. Avakian: Your Honor, if we may see it, I think we will have no objection; it can be marked directly in evidence.

The Court: Yes, all right.

Mr. Avakian: No objection to this being received in evidence.

Mr. Brown: We will offer it.

The Court: The offer will be received as government's exhibit 52, the letter and the envelope together.

Q. Would you read that please, or would you prefer that I read it?

Witness reads Exhibit 52.

"The Bungalow

Sunday.

"Dearest Mother,

"Betty and I just took Mrs. Taylor home. She came over for dinner and we had that canned chicken which was very tender and certainly hit the spot.

"Well, so far we have the desk & chair, (and its a pippin—every one of the boys wish they had one now); the Davenport suit & mattress; the kitchen cabinet, white table and white refrigerator; con-

(Testimony of Mrs. Bessie M. Tracy.)

golium; rug (which looks fine with our blue suit); bridge lamp, smoking stand; [117] John is giving us a bridge table; then we have a nice new bed with Simmons spring & mattress—and its some bed; also we have bought aluminum ware, everyday plates, more dishes (and have to get more pink pieces); broom, mops and still find that the lady of the house wants something every day. The curtains are up and when the hope chest gets here—I hope we will be settled in the nicest apartment in Baltimore. I also got a dark suit and top coat, a haemocytometer and 2 more books which means we have spent (including last months store bill, and room rent, and garage) a little over \$500.00, in other words after this months rent & garage is paid \$48 I will have about \$90 left, and if I go back to the Rotary Club they will do the same thing as with Wayman who got married, after which they refused to lend money.

“Tomorrow next semesters tuition is due \$310—about \$30 lab. fee—and my fellowship has not come thru as yet—consequently I need about \$500 as soon as possible (have waited 'til the last min. to hear from the fellowship). If you could send it with a note for me to sign, or would rather fix it up Easter, or any way suits me. Anyhow I hope this sudden news will not inconvenience [118] you too much. If the loan comes thru I will send it to you immediately if you want to invest or just put it on interest.

“Now that that is off my mind, we are intending

(Testimony of Mrs. Bessie M. Tracy.)

to join the army and the first 3 years out I get \$3000 a year—(which includes allowances for living expenses) or \$3,152.00 to be exact—and if I go to camp this summer \$200 which is paid during my last year here (6 weeks at camp).

“John and his girl friend are coming over this evening to play some bridge. Friday night we played with the Maccubins and last night after I studied from noon ’til 9 we went to a show. Since John saw our apartment he has decided definitely to get married this summer, and I don’t blame him. It’s the only thing and I hope soon to get a hard and fast schedule so I can keep my work up. When that gets adjusted we’re just sitting pretty.

“Right now this little wife is right here wanting to be petted or something, so you understand the dishes are done and she is out of a job, but I’m getting hungry again.

“Bet wants to read this now and says I must finish so she can,—so the bungalow will sign off with everybody happy and feeling better than [119-120] the gov. of Maryland.

“Lots of love,

“Your son.

“Forgot to tell you that Betty is making me a pair of pajamas.”

Mr. Brown: I would like to have marked as plaintiff’s exhibit next in order, for identification, promissory note dated February 15, 1930, in amount of \$500.

(Testimony of Mrs. Bessie M. Tracy.)

The Court: It may be marked government's Exhibit 53 for identification.

Mr. Avakian: Your Honor, we have no objection to its going in evidence if it will save extra marking by the clerk.

Mr. Brown: We will offer it then.

The Court: Very well, it will be received in evidence under the same number.

Q. I show you plaintiff's Exhibit 53 and I ask you if you recognize that? A. Yes.

Q. Would you kindly tell the Court and the jury what that is?

A. That's the note for \$500 that I sent to him at his request in that letter.

Q. I note that it is endorsed on the back, is that correct? A. Yes, my daughter also signed it.

Q. Was the note paid?

A. No, not any one of them. [121]

Q. Are you acquainted with the W. F. Pryor Company, Inc.?

A. I am not acquainted with them but I know of them, and they are sellers of medical goods, publishers as well—I don't know just what.

Mr. Brown: I would like to have marked for identification drawn on the National Bank of Hamilton March 19, 1932, in the amount of \$30, signed by Bessie M. Barbour.

The Court: It may be marked Exhibit 54 for identification.

Q. Mrs. Tracy, I show you government's Exhibit 54 for identification and I ask you if you recognize

(Testimony of Mrs. Bessie M. Tracy.)

that? A. Yes, I do.

Q. Would you kindly tell the Court and the jury what it is?

A. Well, it is a check in payment for some surgical books Dr. Kelley asked me for and he filled it out and I signed it.

Q. Is that your signature at the bottom?

A. That is it.

Mr. Brown: We offer this in evidence as plaintiff's Exhibit 54.

Mr. Avakian: No objection.

The Court: The offer will be received as government's Exhibit 54.

Q. Was it customary for you to purchase the doctor's books and make payments on them?

A. That particular time he asked me and I said I couldn't give [122] to him. He said it cost \$125, the full set, and I couldn't afford to give it, plus giving them their regular allowance, so I gave it to him as I could to pay it in installments.

Q. Did you know an Ernest Brockridge?

A. Yes, very well.

Q. Tell the jury who he was.

A. He was the landlord of my daughter and Dr. Kelley at the time he was intern at Strong Memorial Hospital in Rochester, New York.

Mr. Brown: I would like to have marked for identification check drawn on the National Bank of Hamilton, dated October 20, 1932, in the amount of \$10, signed by Bessie M. Barbour.

The Court: It may be marked Exhibit 55.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Now I show you plaintiff's Exhibit 55 for identification and I ask you if that is your signature? A. Yes, it is.

Q. Would you tell the Court and the jury what that check was given for?

A. It was given to their landlord for rent, to Ernest Brockridge.

Q. Was it customary for you to help them with their rent? A. Yes, it was.

Mr. Brown: We offer the check in evidence as plaintiff's Exhibit 55.

The Court: The exhibit will be so received, government's [123] Exhibit 55.

Mr. Brown: I would like to have marked for identification letter undated, with the title, Strong Memorial Hospital, 216 Crittenden, Rochester, New York, signed, "Wayne, Betty and Doc", together with envelope postmarked June 5, 1933, addressed to Mrs. F. G. Barbour, as one exhibit.

The Court: Plaintiff's Exhibit 56 for identification.

Mr. Avakian: We have no objection to its going in evidence.

Mr. Brown: We will offer it in evidence.

The Court: The offer is received in evidence as government's Exhibit No. 56.

Q. I show you government's Exhibit 56 and I will ask you to tell the Court and jury what that is.

A. Shall I read it?

Q. Yes.

Witness reads Exhibit 56:

(Testimony of Mrs. Bessie M. Tracy.)

“Dear Grandman,

“Took Betty over to chickies yesterday Dolly Hunt is going over to help her with eats & getting a woman today. Need about 15 bucks on a rush order. Will get basket etc. when money comes. Dad Broadbridge is going to help me with hosp. bill.

“A happy and “brokr” family [124]

“Wayne, Betty & ‘Doc’ ”

Q. Does that letter have a letterhead?

A. Yes, Strong Memorial Hospital.

Q. Is it dated? A. No, it is not.

Q. Is that the envelope which enclosed the letter? A. Yes, it is.

Q. What is the postmark?

A. Rochester, 5:00 p.m.

Q. What year? A. 1933.

Mr. Brown: I wish to have marked for identification check drawn on the National Pendleton Bank, dated March 5, 1932, in amount of \$20, signed by Bessie M. Barbour.

The Court: It may be marked plaintiff’s Exhibit 57 for identification.

Q. I show you plaintiff’s Exhibit 57 for identification and I ask you who is the check made out to?

A. Bessie Barbour.

Q. It is signed by whom?

A. Bessie Barbour.

Q. By whom was it endorsed?

A. James P. Durkee, who was their landlord at Johns Hopkins; also I think he kept a small grocery store underneath where they lived. [125]

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you have any recollection of this exhibit?

A. Where it went?

Q. Do you know where it went?

A. Yes, I know—James Durkee.

Q. It went for rent, is that correct?

A. I don't know whether it went for rent or groceries, I wouldn't know.

Q. Was it given to the doctor or your daughter?

A. I don't recall which.

Q. Do you recall if it was given to one or the other? A. That's right.

Q. It was. We offer the check in evidence as plaintiff's Exhibit next in order.

Mr. Avakian: We have no objection, your Honor.

The Court: The offer will be received as government's Exhibit 57 in evidence.

Q. Now you have mentioned that you gave the doctor and your daughter an allowance?

A. That's right.

Q. Do you recall whether that amount was paid every month?

A. Well, it wasn't too regularly. Sometimes when they came home and started away, at the beginning of the semester, they took the money with them sometimes before the second or third month and sometimes I sent a check to them.

Q. Do you recall whether these payments were made to the doctor [126] or to your daughter, or to both?

A. Well, it was for their living expenses.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you recall if you made the checks payable to one or the other, or did you make them payable to both, if you recall? A. I don't recall.

Q. Is it possible——

A. It is possible some went to my daughter and some to the doctor.

Q. What was your daughter's name?

A. Elsbeth Kelley.

Q. And you called her—— A. Betty.

Q. Do you recall over what period of time you gave her this allowance?

A. The remainder of '29—I wasn't aware that I would have to contribute so much to their support, so I didn't promise any regular amount that year of 1929 and 1930, but when he went back to Johns Hopkins in October, I believe September or October, the beginning of the semester, I told them I would try to see that they had \$75 regularly every month from then on until he finished Johns Hopkins.

Q. You don't recall what year he finished Johns Hopkins?

A. Well, he was there four years, and started a year before 1929, so that would be 1928—four years.

Q. Now, Mrs. Tracy, do you have any recollection of the doctor's [127] nature of employment during the summer of 1930?

A. Well, when he came home, came to my home every year, he had no employment and no idea of what he was going to do, so I suggested that to him, "Why don't you truck peas to New York." He said,

(Testimony of Mrs. Bessie M. Tracy.)

"I have no car." I said, "You could hustle one, you know people you should get started hauling truck to New York or Philadelphia." So I loaned him \$200 at that time to buy a small Ford truck.

Q. Do you have any recollection of the financial arrangements you made with him at that time for repayment of the \$200, or was it a gift?

A. Well, I knew he couldn't pay me anything until he was established in his practice, because he had nothing to pay with, so he wasn't expected to. He just said he would pay it back when he could, when he got established in practice.

Q. Did he pay you back that \$200?

A. No.

Q. Do you recall what he did the second summer?

A. He did the same thing, I believe.

Q. Did he borrow money from you then?

A. No, he didn't; I didn't lend him money.

Q. Did he ask for it?

A. No.

Q. Do you believe he did?

A. I believe he did. To the best of my ability, I believe he [128] borrowed \$300——

Mr. Avakian: Just a moment—I think there should be something, not speculation. I think counsel should lay a better foundation.

The Court: Yes.

Mr. Brown: I asked her if she had any recollection. I believe she testified she did have recollection. That is all she testified to that could be evidence and I agree with counsel, it shouldn't go beyond that point. I won't inquire any farther.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Do you recall a transaction involving the purchase of a motor vehicle by the doctor, a Model A Ford? A. Oh yes, I do.

Q. Would you explain to the Court and the jury the nature of that transaction?

A. Well, he kept telling me he thought it was too much for my daughter to ride back and forth to Baltimore in the car that his parents had given him, a two-passenger Ford, and he wanted to buy a new one and he asked me if I would help him and I said yes, so I believe I told him I would try to contribute \$20 a month toward it.

Q. Did you make these payments on the automobile?

A. No, I didn't, I gave it to Dr. Kelley. It was a small community, I didn't want to embarrass him too much.

Mr. Avakian: I will ask that that last be stricken. [129]

The Court: It is explanatory as to why the money was paid to him. However, it may be stricken.

Q. Mrs. Tracy, do you mind telling the Court your age? A. I am over seventy.

Mr. Brown: Thank you. I believe that is all. You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mrs. Tracy, I believe you told us your daughter and Dr. Kelley were married Christmas Day, December of 1929, is that your recollection?

(Testimony of Mrs. Bessie M. Tracy.)

A. I believe that is correct.

Q. Do you recall when it was that they were divorced?

A. 1939 or '40, somewhere in there. I can't tell the exact year.

Q. Were they separated for some time before the divorce? A. I believe about two years.

Q. Your daughter obtained the divorce in Florida? A. Yes, she did.

Q. Prior to the separation, was there a period of time when they were having marital difficulties between themselves?

Mr. Maxwell: I object to this line of testimony. This witness has testified to the financial transactions she had with the defendant, Wayne P. Kelley, and she has also testified to the financial circumstances of the defendant. There has been no other testimony from this witness. It is beyond the scope of direct examination. If counsel wishes to call this [130] witness as his witness at a later date, it will be satisfactory with the government.

Mr. Avakian: Your Honor, I think counsel for the prosecution developed this subject of the marriage and relationship between the two and with the mother. I think this is proper cross-examination.

The Court: I do not think so. I think the witness stated the conditions.

Mr. Avakian: We will defer that matter until later, your Honor. I refrained from objecting to the questions. I was not familiar with the court's procedure—voluntary information.

(Testimony of Mrs. Bessie M. Tracy.)

Mr. Maxwell: I object to characterization of the witness' testimony.

The Court: Comment on the witness' testimony is stricken. The jury is admonished to not consider that. The Court has previously said the Court will give you the law as to how you perform your duties and judging the credibility of the testimony. The Court will also advise you remarks of counsel do not constitute testimony and that you, yourselves, are the sole judges of the weight and credibility of testimony of the witnesses.

Q. Mrs. Tracy, you testified that prior to the time that Dr. Kelley and your daughter were married, you visited the farm of [131] his parents frequently and that you continued to visit the farm of his parents for a short time after the marriage. Can you tell us approximately how long after the marriage you continued to do this?

Mr. Maxwell: May I request that the question be reframed? It did not contain summary of the witness' testimony and counsel did not ask the witness if she had so testified.

Mr. Avakian: I think I have the exact language.

The Court: You may proceed, counsel; restate the question.

Q. Do you recall testifying that you visited the farm of Dr. Kelley's parents for a short time after the marriage?

A. A short period, not a short length of time perhaps—well, his mother was at my house after my husband died, which was in 1938 and between then

(Testimony of Mrs. Bessie M. Tracy.)

all the time we went back for a party or a dinner, or they were at my house.

Q. Where were Dr. Kelley and your daughter married? A. In Hamilton, New York.

Q. In your home? A. Yes.

Q. And it is true, is it not, that no member of Dr. Kelley's family attended the marriage?

A. That is true.

Q. And you stated that while Dr. Kelley was in medical school, during summers and during vacation periods, he and your daughter [132] stayed at your home. Do you recall your testimony?

A. Yes, they did.

Q. And they didn't stay at the home of his parents?

A. That's true. They went there for a visit every Sunday, visit; they didn't stay there.

Q. Incidentally, do you have any checks with you, other than those that you presented here? May the record show that counsel for the prosecution has handed me one check. May I inquire of counsel whether *there any* other checks?

Mr. Brown: No other checks.

Q. I show you what purports to be check dated March 20, 1937. Will you examine that, please?

A. Yes, it is dated March——

Q. Just a moment. We have to follow certain rules, Mrs. Tracy. Do you recognize the signature?

A. My signature.

Q. That is your signature? A. Yes.

Q. And do you recall the circumstances of the

(Testimony of Mrs. Bessie M. Tracy.)

issuance of the check? A. No, I don't.

Q. Do you recognize the signature of the endorsement on the back? A. Yes, I do.

Q. Is that the signature of the party whose name is on the check? A. That is right. [133]

Q. Did you deliver this check to this party?

A. Yes, I did.

Mr. Avakian: I will offer this in evidence, your Honor.

Mr. Brown: We have no objection.

The Court: The offer will be received in evidence as defendant's Exhibit A.

Mr. Avakian: For the information of the jury, I would like to state this check is dated March 20, 1937, drawn on the First National Bank of Hartford, Connecticut, payable to Dr. W. P. Kelley, in amount of \$5.00, signed Bessie M. Tracy, and endorsed W. P. Kelley.

Q. I believe you testified that you do not recall the circumstances of the issuance of the check?

A. I do not.

Q. Mrs. Tracy, while Dr. Kelley and your daughter were living in Baltimore, during the time he was attending Johns Hopkins, did you occasionally visit them? A. Oh, yes.

Q. And in regard to this check for \$20, which is Exhibit 57, the check for \$20 on March 5, 1932, which is signed by you and payable to you and then endorsed by you and by A. P. Durkee, you remember you stated you were not entirely certain of the purpose for which that check was issued?

(Testimony of Mrs. Bessie M. Tracy.)

A. I said I didn't know whether it went for food or for rent. [134]

Q. Is it possible that that was a check which you cashed in Mr. Durkee's grocery store, for the purpose of obtaining cash for yourself while you were visiting there? A. No, I think not.

Q. Can you think of any explanation as to why you would have made this check out to yourself, rather than directly to Mr. Durkee?

A. I can't answer that.

Q. Does my calling to your attention suggest to you the possibility that you may have been cashing a check for your own purpose?

A. I don't think so. I went there by automobile and returned the same way and I would not have any purpose for it.

Q. You didn't spend any money while you were there?

A. I wouldn't say that I didn't spend any money, but I am sure I had money to pay my expenses before I went to see them.

Q. With regard to the \$10 check to Mr. Brockbridge in October of 1932, I believe you testified that he was their landlord, is that correct?

A. That is the time the doctor was intern at Strong Memorial Hospital.

Q. In Rochester? A. Yes.

Q. Do you now have a personal recollection of this gentleman named Ernest Brockbridge? [135]

A. Do I have a personal recollection of him?

Q. Is this just a name?

(Testimony of Mrs. Bessie M. Tracy.)

A. I visited my daughter when she lived in the apartment above Mr. Brockbridge's store, who was their landlord. He is the same party the doctor referred to, calling him "Dad" and helped to pay my daughter's expenses at the time the baby was born. He had to have \$15 when they brought the baby home.

Q. If you would like to see the checks, I would be glad to hand them to you, Mrs. Tracy. I will hand you Exhibit No. 55, the \$10 check to Mr. Broadbridge. If that will refresh your recollection, you may use it.

A. Yes, I believe the check speaks for itself, made out to him and endorsed by him.

Q. Do you know in whose handwriting the check is made out?

A. That is my own handwriting.

Q. Do you know how much rent Dr. and Mrs. Kelley were paying each month to Mr. Broadbridge?

A. It was a very nominal rent, because the doctor was living at the hospital and my daughter was pregnant and they were living with another young doctor and wife who were in similar circumstances, same hospital, and I think their rent was very small. What it was, I don't remember. I think it was around \$20. My daughter paid for each one, I believe. I am not going to testify to that because I am not sure.

Q. I would not expect you to remember after all these years. [136]

A. It is a long time.

(Testimony of Mrs. Bessie M. Tracy.)

Q. Did you stay with them in Rochester yourself?

A. Oh no, I never stayed with them. I have never stayed with them.

Q. Do you have a specific recollection now of this \$10 check?

A. Just a minute. You asked me if I stayed—I stayed about a week in my life and those times I did stay was when the doctor sent for me to take care of the oldest little boy when this boy was born in St. Elizabeth's Hospital, and I believe I stayed in his house quite some time and took care of the boy.

Q. I was only asking about Rochester. I simply asked you whether you *stayed them* in the apartment in Rochester.

A. No, I did not.

Q. Do you have a recollection now of giving this \$10 check to Mr. Broadbridge, or are you simply testifying from what the check indicates, without any independent recollection? I don't know if you understand.

A. I think I said before this check speaks for itself.

Q. What I am trying to find out is whether, independently of the check, you have your own recollection what it was for, or whether you are simply stating what the check says?

A. What else could I do?

Mr. Brown: I will have to object to that question. If she did, the objection would have been interposed to the introduction of the instrument, on

(Testimony of Mrs. Bessie M. Tracy.)

the ground that she had an [137] independent recollection. The instrument went into evidence as her recollection, I believe.

Mr. Avakian: We are entitled to cross-examine.

The Court: Well, proceed, gentlemen.

Q. I will ask one more question about this ten dollar item. What I am trying to find out is, do you now, in 1956, remember the purpose for which you gave Mr. Broadbridge the ten dollar check, or are you simply basing your testimony on your interpretation of the check itself?

A. Well, they had no money whatsoever, they had no income, so how can I assume it was for anything but toward their rent?

Q. You are assuming?

A. How could it be anything else?

Q. I am only asking whether you are assuming it or whether you remember independently? I take it you are assuming.

The Court: She stated she doesn't remember.

Mr. Maxwell: That is my recollection, your Honor.

Q. You stated in the summer of 1930 you suggested to Dr. Kelley that he go into the business of trucking peas to New York or Philadelphia or some other place, do you recall that testimony?

A. Yes, I did.

Q. Do you recall your testimony about his trucking peas? A. I believe I do.

Q. And you said that with the assistance of a loan from you, he [138] bought his own truck and

(Testimony of Mrs. Bessie M. Tracy.)

went into that business that summer? A. Yes.

Q. Do you recall what the nature of that business was—only if you recall?

A. Oh yes, I recall.

Q. Did that consist of buying produce?

A. No, he never bought any produce. He took it as an express, just as express, so much a bushel. He had a small Ford truck.

Q. Do you recall what prompted you to suggest that he go into this trucking of peas?

A. Because he had nothing to do and no income and he could only do something in the summer time, until he went back. It seemed a feasible thing to do.

Q. And you say he continued with this same business in 1931? A. Yes.

Q. Do you recall whether he had any assistants or other people in the conduct of this business?

A. My daughter made every trip except one or two, the whole time of that 123 miles.

Q. She drove with him?

A. She drove with him every single day. He left my home about three or four o'clock in the morning and filled his truck and I got up and got their breakfast and seen them off.

Q. And do you recall whether he had folks there, people to assist him, any employees or any one else who assisted him in [139] this business?

A. Not that I know of.

Q. You never knew of any? A. No.

Q. Were you quite closely familiar with the business?

(Testimony of Mrs. Bessie M. Tracy.)

A. Well, he made every trip from my home and came back to it. He might have hired a man for a day or two or might have had one or two, I don't recall that, over all these years, but he had no regular help, that I knew anything about or ever heard of.

Q. And you are quite definite in that testimony?

A. That's right.

Q. Where did the doctor and Mrs. Kelley live after he completed his internship in Rochester, do you recall?

A. They brought the baby and came to my house and he went immediately to a place called Sacketts Camp. It was some sort of training for the army. An army officer advised him to go ahead and do that, so that when war came he would already have a commission and they would allow him \$300 and expenses, and while he was gone my daughter and I found a location at Leonardsville through a doctor I had known for a long time.

Q. That is in the State of New York?

A. Yes, about, I imagine, about 10 or 12 miles out of Hamilton.

Q. Did they live in Leonardsville?

A. They lived there for a couple of years, maybe more, maybe less. [140]

Q. And moved somewhere else then?

A. To Clinton, New York.

Q. And did they live in Clinton? A. Yes.

Q. Were they living in Clinton at the time of the separation? A. Yes, they were.

(Testimony of Mrs. Bessie M. Tracy.)

Q. During the time that they were living in Leanardsville, did your daughter leave him for a time and return to your home with the boys?

A. No, she did not.

Q. That happened while they were in Clinton?

A. That happened while they were in Clinton.

Q. Did she return home at one time without bringing the boys home?

A. You mean for a definite stay at my home, without her children?

Q. Yes, a separation? A. Oh no.

Q. You are sure? A. Yes.

Mr. Avakian: That is all the questions of this witness, your Honor.

Mr. Brown: We have no further questions, your Honor.

The Court: Do either counsel for the government or the defendant wish this witness to be [141] retained further?

Mr. Avakian: So far as we are concerned, the witness will be excused.

Mr. Maxwell: May the government advise the witness later?

The Court: Very well, if you want the witness, you may advise.

(Jury admonished and recess taken at 4:45 p.m.)

Wednesday, March 28, 1956

10:00 a.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: At the conclusion of yesterday's session, Mrs. Tracy was the witness, and it is my understanding counsel would contact her. Is Mrs. Tracy still present?

Mr. Brown: We are going to request that the witness remain, your Honor.

Mr. Avakian: As far as the defense is concerned, we have no reason to hold her any further. The request is from the plaintiff.

The Court: During the course of the cross-examination, counsel for the defendant asked certain questions and the Court ruled against admission of that testimony. The Court will now rule that the defendant may cross-examine this witness on it.

Mr. Avakian: If the witness is going to be remaining for a time because the prosecution desires, could we confer for a moment and advise the Court later on whether we wish to cross-examine here?

The Court: Yes. We merely want the record to show that I granted that privilege. The government may proceed.

Mr. Maxwell: Your Honor, at this time I would like to have a piece of paper marked for identification.

The Court: The paper will be marked plaintiff's No. 58.

Mr. Maxwell: At this time the government would like to offer into evidence plaintiff's Exhibit 58 for identification.

Mr. Avakian: May I see it?

Mr. Maxwell: Yes, you certainly may, as soon as

I finish making the offer. I am permitted to identify the document.

The Court: Do that briefly.

Mr. Maxwell: Which appears to be a counter-affidavit, Motion for Allowances, etc., filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the matter of Wayne P. Kelley vs. Maxine L. Kelley, filed, it appears to be, March 13, 1946, and the signature of the defendant, Wayne P. Kelley, is attached on the third page. The document itself appears to be a photostat. It is a certified [143] copy.

Mr. Avakian: Your Honor, we are entitled to read it. Counsel could have shown this last evening and we would have looked it over, but I object to the statement that we are delaying.

The Court: Take all the time you want.

Mr. Avakian: We have no objection to this being received in evidence, your Honor.

The Court: The government's offer will be received in evidence as government's Exhibit 58.

Mr. Maxwell: At this time, may it please the Court, I would like to read Exhibit 58 to the jury.

The Court: You may.

Mr. Maxwell: (Reads Exhibit 58.)

"In the Second Judicial District Court of the State of Nevada in and for the County of Washoe

No. 97148 Dept. 2

Wayne P. Kelley, Plaintiff, vs. Maxine L. Kelley, Defendant.

Filed: Mar. 13, 4 p.m. '46. E. H. Beemer, Clerk;
A. L. Donati, Deputy.

Counter Affidavit of Motion for Allowances, etc.
State of Nevada,
County of Washoe—ss. [144]

“Wayne P. Kelley being first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has a good and sufficient defense upon the merits to his wife’s alleged cause of action for a decree of support maintenance and counter claim; that he has a good and sufficient cause of action against his wife for divorce, as more fully appears from his complaint on file herein, to which reference is hereby made;

“That he has read the affidavit of his wife Maxine L. Kelley, Defendant, and that he makes this counter affidavit for the purpose of showing to this honorable court why Defendant, Maxine L. Kelley, should not be allowed the sum of money asked for by her in her Motion for Allowances, and in support of said counter affidavit Plaintiff, Wayne P. Kelley, says:

“That a preliminary counsel fee of \$750.00 should not be allowed because Defendant is well able to pay her own counsel fees; that Affiant does not have the means to pay any counsel fee for Defendant; that although Affiant is a Doctor, Affiant has not practiced private medicine for a period of four years from date, that Affiant’s [145] only income for the past four years has been from his Army pay and that at no time during said past four years has Affiant’s pay exceeded the sum of \$250.00 per month; that during said four years and out of said Army pay Affiant has provided support for De-

fendant, Maxine L. Kelley and Affiant has also had to support his two children by a former marriage;

“That Affiant is now attempting to get back into the private practice of medicine and that it will cost Affiant at least \$5,000.00 to re-establish a practice in medicine, that although Affiant did sell a home in Clinton, New York for \$9,200.00, nevertheless, Affiant had to pay out indebtedness which included commission, mortgage indebtedness, back taxes, and repair bills, and the same amounted to about \$6,500.00;

“That as a result of said sale Plaintiff realized only about \$2,700.00, that Plaintiff has already had to expend more than the sum of \$2,700.00 and to obligate himself for another \$2,500.00 in order to buy equipment and to establish an office to practice his medicine and that Affiant has not yet commenced to practice his medicine;

“That Affiant acquired said home in New [146] York in 1935 and that Defendant, Maxine L. Kelley, never had any interest therein and never had any right to any of the proceeds from the sale of said home.

“That Affiant has seen at least four years of active service in the United States Army and that, at the present time, Affiant is suffering from battle fatigue and is undergoing a course of treatment to improve his physical condition to the point where he will be able to practice medicine in an efficient manner;

“That Affiant is informed and believes and for that reason says that Defendant, Maxine L. Kelley,

is and has been employed as a nurse in a hospital in New York and in such capacity is receiving upwards of \$200.00 a month.

“Plaintiff further says that Defendant’s request for \$500.00 for necessary traveling expenses, etc. should not be allowed because the travel fare from Utica, New York to Reno, Nevada and return, including Pullman charge, is actually \$220.50 and that said amount of \$500.00 is excessive over the amount that would actually be required by Defendant for the purpose of attending the trial in Reno, Nevada. Affiant further says that said allowances should not be [147] made to Defendant, Maxine L. Kelley, for the same reasons hereinbefore stated.

“Affiant says that the sum of \$150.00 for Defendant’s suit money, costs and depositions, should not be allowed for the same reasons hereinbefore stated and because Defendant requires only the sum of \$10.00 as suit money.

“Affiant says that the sum of \$200.00 per month alimony pendente lite should not be granted for the reasons hereinbefore stated and because Defendant, Maxine L. Kelley, is thirty years of age and of good health and is well and able to provide for her own support.

“Affiant further says in support of his statement that Maxine L. Kelley should not be granted any of these sums prayed for in her Motion for Allowances, Etc., that from March, 1942 until January, 1946, Maxine L. Kelley, received from Affiant, directly and indirectly, the sum of Five Thousand

Two Hundred Fifty-five Dollars and No Cents (\$5,255.00);

“That said sum of \$5,255.00 was received by said Maxine L. Kelley from Affiant in the following manner, to wit:

“That from March until May, 1942 said [148] Maxine L. Kelley received collections from Affiant’s accounts amounting to \$300.00 and retained said sum for her own use and benefit;

“That from May, 1942 until December, 1942 said Maxine L. Kelley resided with Affiant at Madison Barracks, New York and received her support and maintenance from and through Affiant and that during said period of time she received the sum of upwards of \$700.00 from Affiant;

“That from December, 1942 until February 17, 1943 said Maxine L. Kelley lived with Affiant at New Orleans, Louisiana and during said period of time received from Affiant the sum of \$555.00;

“That from February 17, 1943 to June, 1944 said Maxine L. Kelley received from Affiant the sum of \$2,250.00 at the rate of about \$150.00 per month during all of said period of time and that said Maxine L. Kelley further received the sum of at least \$1,000.00 as rent from the house owned by Affiant in Clinton, New York and retained said sums for her own use and benefit;

“That said Maxine L. Kelley during said period from February 17, 1943 to Jan. 1945 received United States Savings Bonds of a face value of \$450.00 from Affiant and has retained said Bonds [149] for her own use and benefit;

“Affiant further states that said Maxine L. Kelley has never been an employee of his while she was his wife and that he never owed her any compensation for any such employment.

“Affiant further states that said Maxine L. Kelley was never forced to seek employment but that she voluntarily sought employment.

“Further deponent saith not.”

/s/ WAYNE P. KELLEY,
Plaintiff and Affiant

“Subscribed to and sworn to before me this 13th day of March, 1946.

.....

Notary Public, Washoe County”

Mr. Maxwell: There is a signature but I can't read it.

“My commission expires October 24, 1949.

“Service by copy of the foregoing counter affidavit admitted this 13th day of March, 1946.

.....

Attorney for Defendant.”

No signature for that.

“In the Second Judicial District Court of the State of Nevada in and for the County of Washoe

No. 97148 Dept. No. 2 [150]

Wayne P. Kelley, Plaintiff, vs. Maxine L. Kelley, Defendant.

“I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the fore-

going with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the "Counter Affidavit of Motion for Allowances, etc. and now on file and of record in my office.

"I do further certify that the same has not been altered, amended or set aside, but is still of full force and effect.

"In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 5th day of November, A. D. 1953.

[Seal] /s/ H. K. Brown,
County Clerk."

[151]

"I, A. J. Maestretti, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that H. K. Brown, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

"That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

“And I further certify that said attestation is in due form of the law.

Witness my hand this 5th day of November, A. D. 1953.

/s/ A. J. MAESTRETTI,

One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.”

“State of Nevada,
County of Washoe—ss.

“I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of [152] Washoe, do hereby certify that the Honorable A. J. Maestretti, whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

“In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 5th day of November, A. D. 1953.

[Seal] /s/ H. K. BROWN,

County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.”

Mr. Maxwell: May it please the Court, I would like to have another piece of paper marked for identification.

The Court: It may be marked No. 59 for identification.

Mr. Maxwell: At this time I would like to offer

into evidence Plaintiff's Exhibit No. 59 for identification, which appears to be a quit-claim deed from Winfield O. Kelley and Cora R. Kelley to Lois K. and Wayne P. Kelley, has certification attached to it.

Mr. Avakian: The doctor showed it to us the other evening. We have no objection to its going in. [153]

The Court: Very well, the offer will be received in evidence as government's Exhibit No. 59.

LINO AIZZI

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please for the record? A. Lino Aizzi.

Q. Have you been sworn? A. Yes, I have.

Q. Where do you reside, Mr. Aizzi?

A. 1702 Alban Street, Reno, Nevada.

Q. What is your occupation, sir?

A. Banker.

Q. Can you be a little more specific?

A. Assistant cashier Nevada Bank of Commerce.

Q. I believe you have received a subpoena, asking you to bring down duplicate deposit slip? Is that correct, sir? A. Yes.

Q. And you have that slip?

A. I do. The original.

Q. And can you describe it for the record, exactly more or less what that is, in general terms?

(Testimony of Lino Aizzi.)

A. It is deposit made by George McKaig & Company on July 25, 1952.

Mr. Maxwell: I ask that the deposit slip, identified by the witness, be marked and offer it in evidence at this time. [154]

Mr. Avakian: We have no objection.

The Court: The offer will be received in evidence as government's Exhibit 60.

Q. I will show you government's Exhibit No. 60 and ask you to read the writing on the face thereof, if you will, please, sir, the pencil writing, just state what it is.

A. George M. McKaig & Company, 151 No. 5, July 25, 1952, currency 10,885, 94-2. First and Virginia Branch First National Bank.

Q. Does that indicate the check was deposited?

A. Was deposited.

Q. And what was the amount of the check?

A. \$14,118.25.

Q. Does it also show deposit of cash?

A. Yes.

Q. How much? A. \$10,885.

Q. I wonder if you could add those two amounts for us? Does the addition show on the deposit?

A. Yes, it does. Total \$25,003.25.

Q. Is there anything on the back of Exhibit 60?

A. Yes, there is.

Q. What is on the back of it?

A. It is notation made by the teller who received the deposit, the breakdown of the currency.

Q. What was the amount of currency?

(Testimony of Lino Aizzi.)

A. \$10,885.

Q. What does the writing on the back indicate in the way of currency?

A. One hundred denominations, \$5700; fifty denominations, \$300; twenty dollars denominations, \$3500; ten dollars denominations, \$1240; five dollars denominations, \$125.

Q. I wonder if you could tell us how many bills in each denomination there were in that currency?

A. Fifty-seven hundred dollar bills; six fifty dollar bills; 176 twenty dollar bills, 124 ten dollar bills, 25 five dollar bills.

Q. There must have been some one dollar bills and some change there too, is that right? What was the amount of the currency again?

A. \$10,885.

Mr. Maxwell: I have no further questions.

Mr. Lohse: We have no questions of the witness, your Honor.

(Witness excused.) [156]

Afternoon Session—March 29, 1956

1:30 p.m.

Defendant present with counsel. Presence of the jury stipulated.

Mr. Maxwell: Your Honor, at this time we would place into evidence a stipulation between counsel for the defendant and counsel for the government.

Now it is hereby stipulated by and between the parties in this proceeding, by their respective coun-

sel, for the purpose of this proceeding only, that if the duly qualified custodian of document relating to and including each of the items hereinafter set forth, were called as a witness, such witness would testify as related in each of the two following items: Item 1: That there was on deposit at the Oneida Valley National Bank, Hamilton Branch, account No. 6594, Hamilton, New York, standing in the name of Winfield O. and Phyllis I. Kelley, the following amounts on the following dates: December 31, 1948, \$3,933.98; December 31, 1949, \$3,973.42; Item 2: That there was on deposit with the City and County Savings Bank, Albany, New York, savings account No. 155522, standing in the name of Winfield O. Kelley, M. D. or Phyllis I. Kelley, the following amounts on the following dates: December 31, 1948; \$3509.32; December 31, 1949, \$3567.14.

The Court: Is that a signed stipulation?

Mr. Maxwell: No, your Honor, that is not. I believe counsel will agree that the stipulation has been made. [157]

Mr. Avakian: That is right.

The Court: I suggest it be put in evidence.

Mr. Avakian: We will stipulate. It will be stipulated at this time——

The Court: I think at such time as you have concluded all your stipulations, we should have all the stipulations in the record.

WINFIELD O. KELLEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(Testimony of Winfield O. Kelley.)

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, would you state your full name?

A. Winfield Kelley.

Q. And where do you live, sir?

A. I live in Norwich, Connecticut.

Q. You are a doctor of medicine?

A. That is right.

Q. Where did you receive your degree?

A. Johns Hopkins.

Q. What year? A. 1937.

Q. Doctor, I have subpoenaed you to appear here today, have I not? A. Yes.

Q. You are the defendant's brother? [158]

A. That is right.

Q. You are the defendant's younger brother, are you not? A. Yes.

Q. Doctor, who is Phyllis Dupuis?

A. That is my sister.

Q. What was her maiden name?

A. Phyllis Irene Kelley.

Q. Do you recall when she was married?

A. I can't give you the date, but I would say about a year ago, a little more than that.

Q. Did you and Dr. Kelley, Dr. Wayne Kelley, grow up together in the same home?

A. Yes, we did.

Q. Where was this?

A. We lived in the southern part of New York State on a farm, brought up on a farm, in Sheango Valley, near the village of Hamilton, New York.

(Testimony of Winfield O. Kelley.)

Q. Would you describe the farm, to the best of your recollection?

A. The farm was in the valley, a fertile valley. The farm was approximately 120 or 130 acres, a little over 100, tillable land. Later we had other property which had belonged previously to my grandfather.

Q. What did you raise?

A. General produce and cattle and hogs. [159]

Q. The years that you lived at home, to what years are you referring, to the best of your recollection?

A. My early life was not on the farm. We moved when I was about nine and from there on lived on the farm. My parents lived there in after life until my father died, but I was on the farm until I was through college and medical school.

Q. When did you start medical school?

A. In 1927. Because of my health I quit in 1929 and I was at home a few years after 1929 during my illness until 1935, then went back to medical school, 1935 to '37.

Q. You started medical school before your brother?

A. That is right, although he was older than I. Shall I continue?

Q. Go ahead.

A. He finished a year before I did. I was in college for two years, then went to medical school.

Q. Then the doctor started medical school about 1931, is that correct? A. No.

(Testimony of Winfield O. Kelley.)

Q. 1929, '30, '31? A. 1928.

Q. When did your father pass away, sir?

A. I don't know the exact date. Approximately six years ago.

Q. Did you share in his estate?

A. Well, the estate went to my mother. [160]

Q. Solely? A. She outlived him.

Q. Were you acquainted with the nature of his estate?

A. I would say it involved some savings, plus stocks and bonds, and the farm.

Q. Where was this will probated?

A. After my father's death?

Q. Yes. A. I don't know.

Q. Do you know why your mother took all the estate?

A. It was hers, as I understand. I think she just inherited it.

Q. Do you know what it was?

A. No, I honestly do not know.

Q. Now did you ever discuss with your father financial matters, such as your father's financial status during the years 1926 through 1933, '34, the depression years?

A. Actually very little was said about that. He was making a living on the farm and saving what he could. We didn't have discussions on financial matters.

Q. Now do I understand you to say that you and Dr. Wayne Kelley did not go to college together?

(Testimony of Winfield O. Kelley.)

A. No, I did not say that. We went to the same college, university in Hamilton, New York, but I started a year after he did and finished a year after he did. [161]

Q. What years were those?

A. For me 1923 to 1927; for him 1922 to 1926.

Q. Did you live at the college?

A. I lived at home most of the time.

Q. Did Dr. Wayne Kelley live at the college that you recall?

A. Well, he lived at home some of the time. We both lived part of the time in Hamilton.

Q. Do you know how the doctor paid his way through college, or did you know, first of all, if he——

A. I know I paid my way through when I worked at home and my folks helped me whatever it took to go to school.

Q. And did your parents help your brother, Wayne Kelley, go through college?

A. It was a matter of mutual—we helped on the farm.

Q. And they gave him money to buy his books and things of that nature in return? A. Yes.

Q. Now inviting your attention to the years the doctor went to medical school, were you living at home during any of that time?

A. For a short time, yes.

Q. Do you know how the doctor made his way through medical school financially? When I say the doctor, I am referring to your brother.

(Testimony of Winfield O. Kelley.)

A. Well, at least I can give you some idea.

Q. The best of your recollection. [162]

A. Some of the things he did. Of course, he worked on the farm, there was income from that. My brother decided to carry on a trucking business, not only for my father's products, but for neighbors around the surrounding towns, with his trucking business.

Q. Did your parents help him during that period of time in his trucking arrangements?

A. I don't know just how much they might have handed over to him in cash. I have never gone into those figures.

Q. Have you any idea at all? If you don't know, just say so. A. I do not know.

Q. Do you know if it was necessary for your brother to borrow money to complete his medical education?

A. Well, there was a little time—this goes back into family relationships—when after his marriage, when my folks disapproved of the marriage, there was a rift in the family. He was not favorably accepted. During that time I think it is possible he did borrow some money.

Q. You do not know how much or from where he could have borrowed it? A. No.

Q. Did you keep in touch with your brother after his graduation from medical school?

A. I kept in touch with him by occasional visits when I saw him at home sometimes, because you see during that time I was [163] in school, only home

(Testimony of Winfield O. Kelley.)

on visits. I was always in touch with my family.

Q. Do you have any knowledge of your brother's financial status subsequent to his graduation from medical school and prior to 1938?

A. Well, if you want me to give details, I honestly don't know, because I know he went to practice after post-graduate training, he went into practice.

Q. Did you ever try to borrow money from your brother? A. I don't believe I ever did.

Q. Did your brother ever try to borrow money from you? A. I don't believe he ever did.

Q. Do you know if, subsequent to his graduation from medical school, he borrowed money from any other persons?

A. I have no knowledge of that.

Q. As a matter of fact, isn't it a fact that your family did not contribute to Dr. Wayne Kelley's medical education?

Mr. Lohse: Your Honor, please, that appears to carry with it a tint of cross examination. This is the government's own witness and we object. Counsel is now cross examining his own witness.

The Court: I do not believe so, counsel. It might have been an unhappy expression of words.

A. Did my folks help him through medical school?

Q. Yes, did they help him? [164]

A. Well, I can't say that. I was ill most of that time and it is possible that they did not. I am not sure.

(Testimony of Winfield O. Kelley.)

Q. You do not know?

A. That is the answer.

Q. Very well. Now inviting your attention to the war years, Doctor, the years 1941 to 1945, where were you living during those years?

A. What years are those again?

Q. The war years, 1941 to 1945.

A. 1941 I was in Ann Arbor, Michigan, where I took some of my medical training, surgical, 1941 to 1943. 1943 to 1945 I was in Saranac Lake, New York, practicing.

Q. You were practicing thoracic surgery?

A. Yes.

Q. I ask you if during those years you had any control of any assets of your brother?

A. Referring—I don't remember the years now—

Q. I am referring to the war years now.

A. You are referring to the transfer of deed to property during that time?

Q. As a matter of fact, I am not, Doctor. I am referring to the years 1941, 1942, 1943, 1944, and 1945, stocks and bonds, real property, any other personal property that you may have had for him while he was away in the service.

A. That was before that time. I am not sure right now—my [165] sister and I had a bank account turned over to us. I am not sure whether it was before 1945.

Q. Now let us get back to 1941. First of all, do you recall when your brother was divorced the first

(Testimony of Winfield O. Kelley.)

time? A. I recall the occasion, yes.

Q. Do you recall what year?

A. Yes, when I was in Albany, during the summer of my post-graduate training—I am still guessing—it was probably after 1938 or 1939.

Q. Approximately? A. Yes.

Q. In 1938 and in 1939, 1940, those are the three years preceding the war—did Dr. Kelley, Wayne P. Kelley, at that time give you a cash box?

A. No, the only——

Q. Just answer.

A. The only box was at home.

Q. When you say home, what do you mean?

A. On the farm.

Q. Do you recall when the box was there?

A. I can't. It was during that time. I don't know exact.

Q. Did you ever see the contents of the box?

A. No, sir.

Q. Did you ever see the box itself?

A. Yes, sir. [166]

Q. Do you know how it got there?

A. I don't know. Anything could have happened when I was away. It is a long time ago.

Q. Do you know that the box belonged to Dr. Wayne Kelley?

A. I can't help but assuming it did, because he claimed it. It must have belonged to him.

Q. Under what were the circumstances that he claimed it as his own and at what time, if you recall? A. I don't know.

(Testimony of Winfield O. Kelley.)

Q. The cash box situation is quite vague?

Mr. Avakian: We object to counsel characterizing the testimony. The testimony speaks for itself.

Mr. Brown: That was a question.

Q. Doctor, perhaps if I let you examine some papers which are in evidence, it will help give some time sequence to some of these various things. I will ask you to examine Exhibit No. 30. You do not have to read it in detail, but familiarize yourself with it.

A. You do not want me to read every word of it?

Q. No. I want you to particularly look at the escrow instructions, the sheet on your left hand, and examine the signature at the bottom, has instructions by the buyer. See what you note there. Do you see your signature? A. Yes, sir.

Q. Will you read what it says? [167]

A. Above the signature?

Q. Yes, the signature, I think, is by someone else. Read it.

A. "The undersigned, designated as the seller, hereby agrees to convey the above described property to the buyer herein named, his or her heirs or assigns, upon the above terms and hereby releases the Washoe County Title Guaranty Company from all liability or the custody of said funds or any other matter in connection herewith, in the event the seller fails to comply with the terms of these instructions within the time limit hereinbefore men-

(Testimony of Winfield O. Kelley.)

tioned." Signed Winfield O. Kelley, by Lois K. Kelley.

Q. Does the date on that exhibit call to your mind a transaction, wherein you acted as straw man of the property purchased? A. Yes, sir.

Q. Would you explain, tell the Court and jury, how that came about?

A. At the time—it was during the time when he was having marital difficulties, that he wanted to have this property in somebody else's hands, so that it could not be attached by his former wife.

Q. Did you authorize the party who has signed the escrow instructions to sign them for you, or did you——

A. I certainly agreed to do this, I will say that much.

Q. So it was an agreement between you and your brother that was consummated by letters or by telephone calls that you made it? [168]

A. As I recall, it must have been by letter and telephone. I don't remember he ever made a trip East at that time to Albany where I was.

Q. Now did you contribute any money towards the purchase of that home?

A. No money changed hands.

Q. And you had no financial interest in the purchase of that home at all, is that correct?

A. No.

Q. I show you plaintiff's Exhibit 59 and I will ask you to examine that and see if you recognize that instrument?

(Testimony of Winfield O. Kelley.)

A. Yes, well, this is all in relation to the same thing. I do not remember this exactly. About this ten dollars——

Q. No, we are not concerned about the ten dollars. What we are concerned about is that your signature at the bottom and your wife? Do you recognize and can you recognize it?

A. This is printed. There is no signature here.

Q. That is right, excuse me. That is deed taken from the recorder's office. Do you remember executing such a deed? A. I will say I must have.

Q. You do not actually remember having done it yourself?

A. I am sorry. My memory isn't that good, that's all

Q. It is all right if you do not remember. That was in 1950, wasn't it?

A. I wouldn't say. [169]

Q. What is the date on the deed?

A. April, 1950.

Q. I note down at the bottom that there is the acknowledgment by a notary public, New Haven, Connecticut. A. That does recall.

Q. You recall going to the notary public and signing it?

A. I had a notary public right where I worked.

Q. Doctor, inviting your attention to the year 1948 and the year 1949, did you have any knowledge of a deposit with the Oneida Valley National Bank, Hamilton Branch, of an account standing in the name of Winfield O. and Phyllis I. Kelley?

(Testimony of Winfield O. Kelley.)

A. There was an account.

Q. Did you have a pass book or did you have any papers or documents relating to that account?

A. No. Again, as I recall, my sister was much closer than I was. It is quite likely that she, if anybody, had books, or would be the one to have it.

Q. Did you have any interest in the funds in that account? A. None.

Q. Do you know to whom those funds belonged?

A. They were transferred by my brother.

Q. How do you recall the transaction? How do you place it?

A. Again it was done generally through my sister. She was there and I was away in Connecticut, so nothing changed hands with me. [170]

Q. Do you know that the funds in there belonged to your brother?

A. Well, now I just have to assume they did.

Q. You claimed no interest in them at all?

A. No.

Q. Did you ever sign a deposit slip, to the best of your recollection? A. Yes.

Q. Do you remember how much was involved?

A. I do not believe I have that figure.

Q. Do you recall ever having that figure?

A. I may have had it at one time.

Q. Now I ask you if, during 1948 and 1949, you had on deposit with the City and County Savings Bank, Albany, New York, a savings account standing in the name of Winfield O. Kelley and Phyllis Irene Kelley, in the amount of \$3500?

(Testimony of Winfield O. Kelley.)

A. Yes, sir, I do recall that.

Q. Would you tell the Court and the jury the circumstances concerning your interest in that account?

A. The circumstances were the same as for the deed of the house. There was still the same problem of having my brother transfer property and funds so it could not be appropriated by his former wife.

Q. Do you recall how those transactions came about, whether by telephone conversation or by correspondence, or whether your [171] brother visited you?

A. I think he did by telephone and correspondence, not by visit.

Q. Do you know whether or not Phyllis had any interest in this money?

A. I would say she had no more interest in it than I did.

Q. And none of those funds were yours and you did not participate in them in any way?

A. That is right.

Q. And that refers to the other account too?

A. That is right.

Mr. Brown: You may inquire, gentlemen.

Cross Examination

Q. (By Mr. Avakian): Dr. Kelley, are you a practicing doctor at the present time?

A. Yes, sir.

Q. Will you state what your position is in Connecticut?

(Testimony of Winfield O. Kelley.)

A. My position is chief surgeon in thoracic surgery in the State of Connecticut, surgery of the chest.

Q. Employed by the city?

A. By the State, State Tuberculosis—thoracic relates to pulmonary tuberculosis, also other pulmonary conditions of the chest.

Q. With regard to these bank accounts that you have just been questioned about that stood in the names of yourself and your sister, Phyllis, do you recall what happened to those funds? [172]

A. Well, my brother wrote for them and had them transferred back to him finally.

Q. You have been questioned as to these accounts, with respect to the years 1948 and 1949, and I will advise you there has been a stipulation as to the exact amounts on deposit for those two years. Would you say it was approximately in 1950 that the funds were transferred back to your brother?

A. I can't say specifically to that.

Q. Can you fix it by reference to any other happenings or developments?

A. It must have been after his divorce. I am sure it was after his divorce.

Q. Let me ask you a question—when you refer to his marital difficulties, were you referring to his first wife? A. His first wife.

Q. The one he married in 1929? A. Yes.

Q. And I believe you testified that the divorce was after 1938 or '39?

(Testimony of Winfield O. Kelley.)

A. I don't know as I testified that. I don't know the year that the divorce was.

Q. But you do recall that he was divorced and that he had a second marriage?

A. That is right.

Q. And there was a divorce on that second marriage? [173] A. Right.

Q. Do you know his present wife, his third wife? A. Sure.

Q. What is her name? A. Lois.

Q. Do you recall approximately when that marriage occurred?

A. That occurred after the last war.

Q. Was it fairly closely related in time to the event of purchasing the house in your name in 1947? A. Yes, I believe so.

Q. When you refer to the difficulties with his former wife, in connection with these two bank accounts and in connection with the house, were you referring to difficulties with his first wife?

A. First wife.

Q. Were the funds of these two bank accounts transferred back to your brother Wayne after you understood that there had been a termination of his difficulties with his first wife?

A. Yes, I am sure, that is the way of connecting things up, I am sure after he settled the difficulties with his first wife.

Q. The quitclaim deed, Exhibit 59, a photostatic copy of it, which was shown to you, is dated April, 1950, and that is the date on which you transferred

(Testimony of Winfield O. Kelley.)

the title of the house back to your brother, is that correct? A. Yes. [174]

Q. And was it around that same time that the bank accounts were transferred back to your brother?

A. I would say about.

Q. That fixes it approximately?

A. Yes. I am sorry——

Q. Would you tell us what explanation your brother gave you in connection with the placing of the title to the house in your name and in connection with placing these two bank accounts in the names of yourself and your sister?

Mr. Brown: I object to that as no proper foundation. If we know the people present, where it took place and when, we will withdraw the objection.

Mr. Avakian: Your Honor, he has testified on direct examination that by telephone conversation and by letter he was given various items of information. That is what I am asking about. I simply ask for some specific statement, what was told him, of the particular thing which he testified to on direct examination.

The Court: Objection overruled.

A. I did know that my brother had considerable difficulties with his first marriage. It was an incompatible marriage and finally there was a divorce and after the divorce I know that she continued to cause much trouble in making some kind of a settlement. My brother was having a problem of

(Testimony of Winfield O. Kelley.)

saving himself and his property and in order to protect this property [175] he asked me to take over the house and these bank accounts.

Q. I believe you stated on direct examination he told you he wanted to prevent this all being attached by his first wife?

A. You know the legal expressions better than I do. I don't know what the legal term might have been, but I assume these actions terminated the case.

Q. I believe the word "judgment" is what you used.

A. I used the word but it may have been incorrect.

Q. I am not suggesting that. During your illness, which I believe you stated was from 1929 to 1935, except for your occasional visits home, were you pretty continuously at Saranac Lake?

A. Yes, I was there six years.

Q. Where is that located?

A. In the Adirondacks, northern New York. It is a fair trip from my home.

Q. Approximately how many miles?

A. It would be 160 miles.

Q. During that period, that six-year period, you testified that you occasionally saw your brother. Did you also see his wife during that period?

A. Yes.

Q. And you visited both of them?

A. Yes, I did, occasionally.

Q. Did you also communicate with them by

(Testimony of Winfield O. Kelley.)

mail? [176] A. Yes.

Q. You testified that your father passed away five or six years ago. Is your mother still living?

A. No, my mother died just recently, about six weeks ago.

Q. Where was she living at the time of her death? A. Norwich, Connecticut.

Q. Was she living in your home?

A. No, in a hospital.

Q. What had been her physical condition during the past few years?

A. She had been an invalid.

Q. Had this been a condition which developed progressively over a period of many years?

A. Yes, a gradual development.

Q. You mentioned, Dr. Kelley, that at the time of your brother's first marriage, at that time there was a rift in the family and the folks did not accept Wayne at the time because they objected to the marriage. Would you tell us more specifically what the situation was in that respect?

A. I know that at the time of the marriage, before the marriage, my parents, particularly my mother, was considerably opposed, never approved my brother associating with the girl. Afterwards she was still opposed and continued to be that way. She tried to relent and accept things, but it never worked.

Q. Is it a fair statement, then, that her opposition to this [177] marriage continued continuously, except for these periods of relenting? A. Yes.

(Testimony of Winfield O. Kelley.)

Q. You referred to what I believe Mr. Brown described as a cash box? A. Yes.

Q. Was this in the nature of a safe?

A. I suppose you would call it a safe, yes.

Q. In other words, it was a pretty good sized metal box? A. Yes.

Q. You say that Wayne claimed the box as his. You never saw the contents of it, is that right?

A. No, sir, I never did.

Q. Do you know whether or not Wayne had any of his possessions in that box?

A. Well, I know from his statements that he did have.

Q. These were his statements made at the time?

A. I don't know when they were made.

Q. I mean during this period?

A. At intervals I may have seen him on my visit home, something like that. I never knew the amount.

Q. You mean on your visits to the home of your folks? A. Yes.

Q. And that means back in this period prior to 1935? A. Yes. [178]

Q. You also mentioned, in response to questions on direct examination, something about the farming activities. I did not get your words on this, your voice did not carry through to me. You said something about the nature of the area in which this farm is located.

A. The farm was located in the Shenoyo Valley,

(Testimony of Winfield O. Kelley.)

which is a rather fertile and good valley. It was a fertile farm where we lived.

Q. You stated there were approximately 130 acres? A. Yes.

Q. And around 100 were tilled or cultivated?

A. Approximately 100 were fertile land.

Q. I believe you also spoke of some additional farm land. Would you give us some detail?

A. My grandparents, we took over their farm, my mother's family, so we had that farm. We used all these pieces for various activities on the farm, cattle raising and produce, other products.

Q. Produce, corn, or the general type of thing we go into in truck farming? A. Yes.

Q. What was your brother Wayne doing in connection with these farming activities, as best you can relate?

A. We were offered a living on the farm and I said already in addition to the usual work on the farm, my brother took on additional enterprise trucking produce to market. [179]

Mr. Maxwell: May we have this tied in by years?

Mr. Avakian: I will ask the witness to do the best he can.

A. Well, it was roughly between 1927 and 1930, I would say.

Q. And then you were gone for a period of about five years?

A. I was away after 1929 and he still did after I left. Of course, when I was away, I couldn't keep track of every activity. I knew he was doing the

(Testimony of Winfield O. Kelley.)

same thing, working hard, trucking, getting his products to market.

Q. To what markets were the products hauled?

A. New York City, mostly, I think.

Q. This business, then, involved the harvesting of crops and shipment to produce houses in the large metropolitan areas? A. Right.

Q. Can you tell us whether or not it was an important factor in the way that business profitable or not, whether the produce was shipped to arrive in a fresh condition?

A. Well, I can say it was profitable, yes. I am sure that my brother did quite well at it during the summer months. It was a good product.

Q. In addition, can you tell us whether or not the nature of that business was such that it was important, in order to make a good profit, to get the produce in the metropolitan markets as quickly as possible after picked? A. That is true. [180]

Q. And the condition of the produce would make a substantial difference?

A. Yes, would make a complete difference, such as peas picked and put in baskets and carried to the city must be fresh.

Q. Can you tell us what the performance of your brother Wayne was in that regard during the period you were at home, prior to 1930?

A. Well, his work was a combination of helping other farmers and getting baskets ready, acquainted with the farm industry, peas to be picked and put in baskets and shipped, getting stuff ready for mar-

(Testimony of Winfield O. Kelley.)

ket and shipped to market. He had a helper driving trucks also. One truck driver slept while the other drove, so there was no time lost.

Q. Do you know whether or not that speeded up shipment of products? A. Yes, it did.

Q. I believe you testified that there were some marital difficulties during the marriage of your brother to his first wife. During the period of that marriage, while they were living together, did you from time to time visit with the two of them?

A. Yes, I did.

Q. Did you have an opportunity then to observe personally the nature of their relationship with each other?

A. Yes. I should say perhaps that my visits were not long and it is quite likely they were on good behavior while I was there, [181] so I didn't see too much discord, but I knew and I also knew from reports from others.

Mr. Avakian: That's all.

Redirect Examination

Q. (By Mr. Brown): Doctor, you have testified on cross examination that Dr. Kelley's first wife continued to make trouble for him, as I understood, that she could appropriate his property, is that correct? A. That is my understanding, yes.

Q. Do you know how many children he had by his first wife? A. Yes, sir.

Q. How many? A. Two boys.

Q. Do you know what the doctor contributed to

(Testimony of Winfield O. Kelley.)

their support? A. No.

Q. Do you know what the doctor contributed to his first wife in the nature of alimony?

A. No, sir.

Q. Do you know what provisions he made for a division of any property he secured during their marriage? A. No.

Q. It is possible some of this discord could have arisen out of these various matters?

Mr. Lohse: Your Honor, please, I submit that is an improper question. [182]

The Court: Answer the question. He said is it possible.

Mr. Lohse: I move it be stricken——

The Court: Have you answered?

Mr. Brown: No.

The Court: Can you answer the question?

A. Would you state it again?

Q. I say, is it possible the marital discord, or rather these attempts to appropriate his property, could have arisen over conditions concerning these various factors?

Mr. Avakian: I do not understand whether the question refers to during the marriage or after the divorce or both?

The Court: I am going to ask you to reframe that question.

Mr. Brown: I will withdraw it entirely, your Honor.

Q. The produce business which you have described was pretty lucrative, was it not?

(Testimony of Winfield O. Kelley.)

A. Not having an oil well.

Q. Well, do you think it was worth ten thousand dollars a summer? Do you think your brother made that through the summer?

A. I would think probably not. I think that is a little excessive, but I don't know.

Q. How much did you make when you engaged in that business?

A. I didn't do that. I wasn't staying at home, and I had to leave when he was in most of it, from there on. [183]

Q. Do you think he could have saved one hundred thousand dollars during those three years, as a result of his activity?

A. I do not believe he could have, quite that much. I do not know the figures, however.

Q. This was during 1929, 1930, 1931 and 1932 now. How much money did you save when you worked on the farm during the summer?

A. I would say that our arrangements were completely different.

Q. How much money did you save?

A. I didn't have any money actually of my own. It all went into the family funds.

Q. You didn't get anything?

A. Of course, I got what I needed to go to school.

Q. Have you any idea what that amounted to? What did it cost to go to medical school a year in 1931, 1931 and 1932, a thousand dollars?

A. Oh, more than that.

(Testimony of Winfield O. Kelley.)

Q. Two thousand?

A. I would say over two thousand dollars.

Q. But you don't know whether he could have saved seventy-five thousand dollars during those three summers?

Mr. Avakian: Objected to as pure speculation. The witness has said he doesn't know—pure guess work.

The Court: As I understand the testimony, this witness has no idea at all what his brother made in [184] this business.

A. I can't give you any figures, I don't know.

Q. How do you know it was lucrative then?

A. Well, my brother told me he made money during those years.

Q. Did he tell you how much money he made?

A. No, he did not.

Q. When did he tell you?

A. During the times I was home. I know there was money. Of course he wouldn't be doing it if he couldn't make some money.

Q. How much money is relative?

A. I don't know.

Mr. Brown: That's all.

(Witness excused.)

Monday—April 2, 1956

Defendant present with counsel. Presence of the jury stipulated.

ANN DRISCOLL

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, will you state your full name?

A. Ann Driscoll.

Q. And where do you live?

A. 930 Novilly Drive, Reno.

Q. How long have you resided in Reno, to the best of your [185] recollection. A. Since 1928.

Q. You have been previously sworn in this matter, have you not? A. Yes.

Q. And you appear here this morning pursuant to a subpoena which I have caused to be issued, is that correct? A. Yes.

Q. Are you married? A. Yes.

Q. Your husband's name is William J. Driscoll?

A. Yes.

Q. You are employed? A. Yes, I am.

Q. What is your occupation?

A. I am with the American Automobile Association.

Q. I invite your attention to the years 1949 to 1952 inclusive, and I ask you if during that period of time you were employed by Dr. Wayne P. Kelley? A. Yes, 1949 and before, 1948.

Q. Now, with reference to the year 1949, will you tell the Court and the jury, very briefly, of what your duties consisted?

A. I was an assistant.

(Testimony of Ann Driscoll.)

Q. You mean an office assistant? A. Yes.

Q. Did you work in his office? [186]

A. Yes, I did.

Q. Where was his office at that time?

A. In the Masonic Building.

Q. In Reno? A. Yes.

Q. Did you keep the books?

A. No, I did not.

Q. Do you know who did keep the books?

A. I believe Mrs. Kelley.

Q. When you say you believe Mrs. Kelley kept the books, will you tell the Court and the jury on what you base your belief?

A. Well, she paid my salary, her signature was on the check, and we didn't keep books at all in the office. We collected money, I kept the record of the patients.

Q. Did Mrs. Kelley have anything to do with your withholding transactions with the State of Nevada or with the federal government?

A. She deducted our income tax from our check.

Q. Mrs. Driscoll, did you pay any of the doctor's bill? A. No, I did not.

Q. Did you write any of his checks?

A. No, I did not.

Q. Did you have a check book? A. No.

Q. Did you bill the patients? [187] A. Yes.

Q. What was the procedure used in billing the patients?

A. I would take the amount from the patient card and bill the patient.

(Testimony of Ann Driscoll.)

Q. Would you tell the Court and the jury what the patient card is? Would you describe one, please?

A. It is a file card, about so large, records the dates a patient calls and the amount paid.

Q. Did you keep an appointment book?

A. Yes.

Q. Were any amounts paid by the patients recorded in the appointment books?

A. I don't know.

Q. Did you keep a receipt book? A. Yes.

Q. Would you describe the receipt book please.

A. Well, the receipt book kept a carbon copy and we would write out the patient's name and amount paid.

Q. Was a duplicate kept in the receipt book?

A. Yes, sir.

Q. And do you know whether these receipt books were kept in the office, to the best of your recollection?

A. I believe they were until they were used up.

Q. And then do you know what happened to them? A. I turned them over to the doctor.

Q. Did you make up any deposit slips?

A. No, sir.

Q. Did you ever do any banking for the doctor?

A. No, sir.

Q. Did you have a cash box? Was it ever necessary to make change? A. Yes.

Q. How was that done?

A. I would get it from the doctor.

(Testimony of Ann Driscoll.)

Q. Do you know where the doctor got the change or made change? Did he have a cash box?

A. I don't remember whether he took it out of his pocket or whether he had a cash box.

Q. Did you ever receive cash from patients when they paid the bill?

A. Yes, checks and cash.

Q. What did you do with the cash?

A. Gave it to the doctor.

Q. Did you give a receipt for it?

A. Yes, I did.

Q. Did you make any entries on any books of any sort? A. Only on the patient card.

Q. Did the patients ever pay the doctor directly?

A. Yes, some did.

Q. Did you give a receipt? [189]

A. To some people, yes.

Q. Did you ever observe the doctor give a receipt? A. I can't say that. I don't remember.

Q. Did you always make a notation on a patient card every time you received a payment in cash or by check? A. Yes.

Q. What was the office procedure with reference to the incoming mail?

A. Well, if any mail looked like it was from a patient, I would open it and record the amount received through the mail. Any of the doctor's personal mail I did not open.

Q. Did you ever give receipts to patients when you received a check by mail?

A. Would you repeat that?

(Testimony of Ann Driscoll.)

Q. Did you ever mail receipts to patients when you had received a check by mail? A. No.

Q. Mrs. Driscoll, did you ever see patients in the office for whom there were no patient cards?

A. No, sir.

Q. Now, I again invite your attention to the appointment book and I ask you if you recall having seen any notations of amounts paid by patients not in the appointment book? A. No.

Q. I show you plaintiff's Exhibit 71 in evidence, and I ask you [190] if that is the type of receipt book or the type of receipt that you customarily issued?

A. It has been so long ago—it seems to me at the time I worked for the doctor he had receipts with his name on it.

Q. I show you plaintiff's Exhibit 61 and I ask you if that is the type you generally used?

A. Yes.

Q. I show you plaintiff's Exhibit 63 and I ask you if it was customary to use prescription slips as receipt forms? A. That I do not recall.

Q. I show you plaintiff's Exhibit No. 94 and I ask you if it was customary in the office to issue receipts of that nature?

A. No, I don't recall any like that.

Q. Mrs. Driscoll, did the doctor have an airplane while you were working for him?

A. Yes, sir.

Q. Did he ever discuss with you the use of his airplane? A. No.

(Testimony of Ann Driscoll.)

Q. Did he ever say for what he used the airplane? A. He enjoyed his airplane.

Q. Did he indicate, or did you have any indication while you were working for him, whether or not he used his airplane in connection with the practice of medicine? A. No.

Q. You have no recollection of that whatsoever?

A. No.

Mr. Brown: You may inquire.

Cross Examination

Q. (By Mr. Lohse): Mrs. Driscoll, with reference to any discussions you might have had with the doctor concerning the use of his airplane, isn't it a fact, at the time you worked there, he did use that airplane to attend medical meetings, is that not true?

A. Well, I can't remember. I really don't remember his saying; he may have.

Q. Did the doctor ever take a trip in the airplane during the year that you worked for him?

A. I have a very poor memory, I am sorry, and I can't recall. He may have taken a trip, but I am sorry, I just can't say whether he did or not.

The Court: That is perfectly all right. If you can't recall, that is your answer.

Q. Mrs. Driscoll, while you served the doctor as his assistant, do you recall he had as patients pilots for physical examinations? A. He may have.

Q. Do you recall any specific patients?

A. No.

(Testimony of Ann Driscoll.)

Q. Inviting your attention again, Mrs. Driscoll, to the year 1949, I believe you stated to Mr. Brown on his direct examination that the doctor kept a date book or date calendar in his [192] office for appointments?

Mr. Brown: I think she testified she kept it.

A. I had one on my desk.

Q. Do you know, Mrs. Driscoll, whether the doctor had one in addition to the one that you kept?

A. I believe he kept a record, too.

Q. During that period of time was it your practice to enter the names of the patients in the date book as they appeared in the office? A. Yes.

Q. Isn't it a fact, Mrs. Driscoll, that you likewise made entries of payments from patients in that date book?

A. No, not in the book, on the file card, the patient card.

Q. Isn't it your testimony that the doctor did not keep a date calendar on his desk at the time you had one?

Mr. Brown: She testified the doctor did keep a calendar. I believe you are misquoting her testimony.

Mr. Lohse: I don't want to misquote. I was confused; can you explain?

A. As I recall, the doctor did keep a record and date book on his desk.

Q. Did you ever have any occasion, actually, to observe such a record?

A. I may have, I can't recall.

(Testimony of Ann Driscoll.)

Q. Do you not know whether he actually made any entries on [193] such record in his office?

A. No. At the time I was there I can't recall.

Q. I believe, Mrs. Driscoll, you testified on direct examination that whatever payments you received in currency you would issue receipts for, during the time you worked in the doctor's office?

A. Yes.

Q. You are certain of that? A. Yes.

(Witness excused.)

MARGUERITE McKNIGHT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Brown): For the purpose of the record, what is your full name?

A. Marguerite McKnight.

Q. You were sworn here this morning, were you not? A. Yes.

Q. You appear here because you were subpoenaed, isn't that correct? A. That's right.

Q. Miss McKnight, where do you live?

A. On Arlington Avenue, Reno.

Q. And you have lived in Reno for some years last past? A. Twenty-eight years.

Q. Are you married? [194]

A. No.

Q. Are you employed? A. Yes.

Q. What is your occupation?

(Testimony of Marguerite McKnight.)

A. General office work, insurance.

Q. Where?

A. McDow and Showalter Insurance.

Q. Inviting your attention to the year 1949 to the year 1952 inclusive, I ask you if during that time you were employed by Dr. Kelley?

A. Yes, I was.

Q. Do you recall the years?

A. May 1949, 1950 and into 1951.

Q. Could you tell the Court and the jury, very briefly, of what your duties consisted?

A. Yes, general office nursing.

Q. Did you keep any books?

A. No, I kept no books.

Q. From whom did you receive your pay check?

A. From Dr. Kelley.

Q. Was it always signed by Dr. Kelley?

A. I don't quite recall whether sometimes Dr. Kelley's signature or Mrs. Kelley's.

Q. Who prepared the withholding statements?

A. I presume they were done outside the office.

Q. They were not done by you? A. No.

Q. Did you pay any office bills, write any office checks? A. No, I paid nothing.

Q. Did you have an office check book?

A. No.

Q. Did you bill the patients?

A. Yes, there were monthly statements sent out by me.

Q. Will you tell the Court and the jury what your procedure was in billing the patients?

(Testimony of Marguerite McKnight.)

A. They were billed from running balances presented on their card, history card.

Q. Would describe the history card? Tell us what a history card is.

A. Yes, a history card is kept by most doctor's offices, with their patient's name, their complaint, their ailments, and a running down probably of their account on the reverse side.

Q. They are sometimes referred to as patient cards? A. Yes, I believe so.

Q. Did you keep an appointment book?

A. Yes, we had a daily appointment book.

Q. Did you ever record any amounts paid by the patients in your appointment book?

A. No, not in the appointment book.

Q. Did the doctor keep an appointment book?

A. Yes.

Q. Did you ever have occasion to observe or examine that appointment book?

A. I frequently made notations in the appointment book.

Q. Do you recall ever having observed notations of patients' payments being made in the doctor's appointment book?

A. No, I do not recall notations of that kind.

Q. Did you make up any deposit slips or do any banking for the doctor?

A. No, I handled no money.

Q. What was the procedure when a patient paid you?

A. When a patient crossed from the outer office

(Testimony of Marguerite McKnight.)

desk, he was given a receipt for it and that money was immediately given to Dr. Kelley.

Q. You didn't have a cash box? A. No.

Q. Suppose the patient paid you by check, what did you do?

A. That was likewise recorded and given to Dr. Kelley.

Q. You didn't hold the cash and didn't hold the checks at all? A. No.

Q. Did you ever observe patients paying Dr. Kelley?

A. Yes, at times as I would go through the inner office, they would be paying the Doctor.

Q. Did you ever on those occasions, and at the doctor's direction, give them a receipt? [197]

A. Yes.

Q. Did you testify that you kept a receipt book? Did I ask you that question? A. Yes.

Q. Do you recall what happened to it—first of all, can you give us an estimate of how long a receipt book lasted?

A. I don't recall if the size of them was 100 or 500, might be smaller.

Q. You used several in the course of your employment? A. Oh yes.

Q. Now I ask you if you always made a notation on the patient cards when you received payment by cash or by check?

A. Well, those notations were made from the receipt book, it is possible at the time of payment.

(Testimony of Marguerite McKnight.)

Frequently there wasn't time at that moment to record on the card.

Q. But to the best of your recollection was it always done? A. Yes.

Q. What was your procedure when you received checks by mail?

A. Those that crossed my desk were receipted and a notation made on the patient's card.

Q. Now with reference to the patient cards, was there one large file or was it several files, or can you tell the jury and the Court how they were set up?

A. As I recall, there were two drawers of cards, the active drawer and another drawer of cards, inactive patients that [198] weren't coming in regularly or paid-up patients. When the cards were cleared, they were kept in that file.

Q. They were not current patients, is that correct?

A. No, there were two cards, one for current patients and one for inactive.

Q. Then when a patient was paid up, but he was still active, was he in one drawer, is that what I understood you to say?

A. Well, as I recall, the active cards were in one drawer and the patient that wasn't coming regularly was kept in the inactive file, usually was paid up.

Q. Do you know whether or not the doctor kept an airplane?

A. Yes, at the time I was with Dr. Kelley he had an airplane.

(Testimony of Marguerite McKnight.)

Q. Did you ever have any conversations with the doctor concerning the use of his airplane in connection with his practice?

A. No, I didn't know that he used it for his practice.

Q. Did he ever remark what he used it for?

A. Well, it was quite enjoyable.

Q. Do you recall whether or not the doctor used it for the purpose of any medical conventions, while you were employed?

A. Yes, while I was with Dr. Kelley he used it to fly to two or three conventions, I believe.

Q. Do you recall whether he ever flew on trips other than to medical conventions?

A. Pleasure trips over week-ends.

Q. Do you recall if he ever took a trip to Alaska? [199]

A. Yes, he took a short trip to Alaska.

Q. Do you know if that was in connection with his practice?

A. I presumed it was just a vacation trip.

Q. Do you know whether or not the doctor treated, or whether he had as patients, Civil Aeronautics pilots?

A. No, I don't.

Mr. Brown: You may inquire.

(Jury admonished and morning recess taken at 11:00 o'clock.)

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

MISS McKNIGHT

resumed the witness stand on

Cross Examination

Q. (By Mr. Lohse): Miss McKnight, I believe Mr. Brown asked you whether or not you recall the doctor examined any patients for the Civil Aeronautics Authority and I believe your answer was that you could not recall, is that correct?

A. I don't recall; he may have.

Q. I understand there has been a long lapse of time, Miss McKnight. Now let me ask you this perhaps to refresh your recollection, isn't it a fact, Miss McKnight, at least on some occasions during the time you served Dr. Kelley, you filled out forms requiring to be sent to the Civil Aeronautics Authority after the doctor had examined patients?

A. Yes, it is.

Q. Do you remember any specific patients for whom that was done?

A. I don't recall.

Q. Do you recall, Miss McKnight, ever sending in forms from the doctor's office to the Civil Aeronautics Authority?

A. Yes, their office did.

Q. Were there many instances, Miss McKnight, during the time you served the doctor, that you made out forms for use for governmental agencies on patients?

A. We made out Industrial forms.

Q. Did you make those out and send them in, is that correct?

A. Yes.

Q. And that doesn't refresh your recollection in

(Testimony of Marguerite McKnight.)

connection with the CAA? A. It is possible.

Q. It is possible, but you do not actually remember filling out any, but it is possible, is that right?

A. Oh sure.

Mr. Lohse: I think that is all.

Mr. Brown: That is all.

(Witness excused.)

HELEN L. HILL

a witness on behalf of the plaintiff, being duly sworn, testified as follows: [201]

Direct Examination

Q. (By Mr. Brown): State your full name please? A. Helen L. Hill.

Q. You were heretofore sworn this morning?

A. Yes.

Q. You appear here pursuant to subpoena which was issued by me, do you not? A. Yes.

Q. Where do you live, Mrs. Hill?

A. 850 Brentwood Drive.

Q. Reno? A. Yes.

Q. You have lived in Nevada for some years last past? A. Yes.

Q. What is your occupation?

A. Medical secretary.

Q. Calling your attention to the years 1949 to 1952 inclusive, were you employed by Dr. Kelley during those years? A. Yes.

Q. Do you recall specifically in what years?

A. 1951.

(Testimony of Helen L. Hill.)

Q. Tell the Court and jury, very briefly, of what your duties consisted.

A. My duties consisted of medical assistant, helping with the office and answering the telephone.

Q. Did you keep any books? A. No, sir.

Q. How did you receive your pay check?

A. It was brought to me.

Q. By whom? A. By Dr. Kelley.

Q. How was the check signed?

A. I don't recall; I believe it was Dr. Kelley.

Q. Do you ever recall having received any checks signed by Mrs. Kelley?

A. I do not remember.

Q. Did you write any office checks? A. No.

Q. Did you pay any office bills? A. No.

Q. Did you receive any office bills?

A. They might have come in the mail.

Q. Did you bill patients? A. Yes.

Q. Would you tell the Court what that procedure was?

A. The usual monthly statements that you send out at the end of the month.

Q. Where did you get your information?

A. From the patient card filed.

Q. What is a patient card? [203]

A. Well, a card about like this, has the history on it and charges made to the patient.

Q. Were they kept by you? A. Yes.

Q. Did you keep an appointment book?

A. Yes.

Q. Did the doctor keep an appointment book?

(Testimony of Helen L. Hill.)

A. I really believe he had an appointment book, but I can't say for sure.

Q. Did you ever make any notations in your appointment book of amounts paid by patients?

A. No.

Q. You are not sure about the doctor's appointment book, you don't know whether or not he made any notation of payments by patients in it, do you?

A. No.

Q. You kept a receipt book, did you not?

A. Yes.

Q. Did you issue a receipt for all amounts that came across to you, checks? A. Yes.

Q. Did you have a cash box? A. Yes.

Q. Where was the cash box kept?

A. In the desk drawer. [204]

Q. What would you do with your accumulated cash at the end of the day?

A. Took it to Dr. Kelley.

Q. Did you make deposit slips? A. No.

Q. Did you ever do any banking? A. No.

Q. Did you ever observe payments made to the doctor directly? A. I don't recall.

Q. Do you recall how often you would use up a receipt book? A. No.

Q. If you have a file of used receipt books in the office? A. No, not that I can recall.

Q. Did you ever receive checks by mail?

A. Yes.

Q. Do you recall who opened the mail?

A. I did.

(Testimony of Helen L. Hill.)

Q. Always? A. I can't say for sure there.

Q. You don't remember? A. No.

Q. Now when you received a check by mail, did you issue a receipt? A. I don't recall.

Q. Did you ever see any patients for whom there was no patient card? [205]

A. No, I never did.

Q. Do you know whether or not the doctor had an airplane? A. He said he did.

Q. Do you know if he used his airplane in connection with the practice of medicine? A. No.

Q. Do you know whether he used his airplane for purposes of his own personal pleasure?

A. I believe he did.

Q. Upon what do you base your opinion?

A. His saying that he liked to fly.

Q. Can you recall any time that he used his airplane in connection with his practice? Did he have patients in other cities and other states?

A. Not that I know of.

Q. Do you recall whether the doctor attended medical conventions during the time you were employed by him in his airplane? A. Yes.

Q. Do you recall where he went?

A. I believe he went to Atlantic City.

Mr. Brown: You may cross examine.

Cross Examination

Q. (By Mr. Avakian): Mrs. Hill, I take it you worked for Dr. Kelley only a short period of time, is that right? [206] A. Yes.

(Testimony of Helen L. Hill.)

Q. Is that because you preferred to take a job where you could work part time instead of full time? A. Yes.

Q. And the work at Dr. Kelley's required full time? A. Yes.

Q. Can you tell us, Miss Hill, during the time you were working there, whether there was a rather heavy load of detail work? A. Yes.

Q. Did this mean quite frequently the making of entries as to receipt of money had to be delayed until some time after the money had actually been received, until you could get a breathing spell?

A. Yes.

Q. Do you recall that Dr. Kelley went to the medical convention in Atlantic City in his own airplane? A. He said he did.

Q. You recall he went to the convention?

A. Yes.

Q. Do you recall, Mrs. Hill, during the period you were there, Dr. Kelley from time to time had patients who were pilots? A. Yes.

Q. Do you remember whether or not he conducted physical examinations of pilots for the Civil Aeronautics Authority? [207] A. Yes.

Q. And that required filling out some forms to be filed with the CCA? A. Yes.

Q. Did you assist in the preparation of those forms? A. I did.

Q. Can you tell us, as best you can after all these years, what type of information you, as office assistant, entered on those forms?

(Testimony of Helen L. Hill.)

A. The name and address—I really don't know.

Q. Do you know whether or not you took down preliminary information as to the patient's age and weight?

A. I do not recall. I believe I checked the name and address; I do not recall.

Q. Do you recall whether, after the examination, you did any typing on any of these forms?

A. No.

Q. Do you recall whether or not you mailed anything in to the CAA? A. I do not recall.

Q. But you do remember that these forms were filled out for some of these CAA patients?

A. Yes.

Mr. Avakian: That is all. [208]

Redirect Examination

Q. (By Mr. Brown): Do you recall how often the doctor, in his practice, saw an aviator?

A. No.

Q. Do you remember how many came into the office? A. No.

Q. Do you recall if one came in every day?

A. No, he didn't.

Q. Can you give us your best estimate of how often he saw an aviator? A. I don't know.

Mr. Brown: That's all.

(Witness excused.)

ESTHER S. VILLARS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

(Testimony of Esther S. Villars.)

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Esther S. Villars.

Q. Where do you reside, Mrs. Villars?

A. Reno.

Q. What is your occupation?

A. Office work.

Q. Were you ever employed by Dr. Wayne P. Kelley? A. Yes.

Q. Can you recall when you were employed?

A. August 15th to March 20, 1951 and 1952.

Q. Mrs. Villars, what did you do for the doctor during that time? What was your general work?

A. General office work, assisting the doctor.

Q. Did you keep any books for the doctor?

A. No.

Q. Did you have anything to do with the payments that were made by the patients?

A. Yes.

Q. What would you do?

A. I receipted for them.

Q. Did you make the receipts at all times?

A. Not at all times.

Q. Who else made the receipts, if you know?

A. The doctor.

Q. What would you do with the money after you received it and issued a receipt to the patient?

A. Put it in the cash box.

Q. You had a cash box then? A. Yes.

Q. What would you do with the amounts in the cash box at the end of the day?

(Testimony of Esther S. Villars.)

A. Give it to the doctor.

Q. Did you make all entries on the patient card for payments that came across to your desk? [210]

A. Yes.

Q. Did you make any entries on patient cards for payments that were given to the doctor, if there were any?

A. I don't remember.

Q. Do you recall whether receipts were issued in all cases?

A. No, I don't.

Q. Mrs. Villars, do you have any idea whether most payments were made there by currency or check by the patients?

A. I wouldn't know.

Q. Do you know whether currency exceeded those of checks, or you don't know?

A. No.

Q. Now did you keep the files of patient cards, Mrs. Villars?

A. Yes.

Q. How many files did you have?

A. Two.

Q. And what was in each one of those two files?

A. One was current unpaid and the other was paid.

Q. Were all of the patient cards in your files?

A. No.

Q. Where were the others, if you know?

A. Well, some of them were in the doctor's drawer, top desk.

Q. Dr. Kelley would keep some of the patient cards in his top desk drawer?

A. Yes. [211]

Q. Did you ever have a patient give you a payment that you could not find a patient card?

A. I do not know.

(Testimony of Esther S. Villars.)

Q. Did you ever have occasion to ask Dr. Kelley for any patient cards he kept in his desk?

A. Yes.

Q. What was the purpose of that?

A. To apply payments.

Q. Would he give you those? A. Yes.

Q. What did you do with the card after you had made the application? A. Put it back.

Q. Now, Mrs. Villars, did Dr. Kelley have an airplane? A. Yes.

Q. Do you know what he used that airplane for?

A. No.

Q. Did he use it for business?

A. Well, I don't know. He went to conventions with it.

Q. Did he ever use it for vacation trips?

A. One that I know of.

Q. What was that? A. Hunting.

Q. Do you know whether or not he flew every morning?

A. I don't know if he flew every morning, but he did fly [212] some mornings.

Q. Was that for pleasure or for business?

A. I don't know.

Q. Did he ever have any patients early in the morning when he flew his airplane?

A. Not that I knew.

Mr. Brown: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mrs. Villars, with re-

(Testimony of Esther S. Villars.)

gard to these patient cards that were kept in Dr. Kelley's desk, you say that at times you asked for those patient cards so you could record a receipt of money on it? A. Yes.

Q. And then you put the card back, is that right? A. Yes.

Q. Did these represent patients who were coming in frequently? A. I don't know.

Q. Well, they were cards at least on which you received money at the time? A. Yes.

Q. Does that refresh your recollection, if you were receiving payments that these in general were patients that came in regularly to see the doctor?

A. No, I don't think so. It is rather difficult to recall this long. [213]

Q. Did the doctor have patients who, at times, came in regularly for a number of days close together, for a course of treatment? A. Yes.

Q. With regard to the airplane, Mrs. Villars, do you recall that Dr. Kelley from time to time had patients who were pilots? A. Yes.

Q. And do you recall that from time to time he conducted physical examinations for pilots, in connection with their CCA examination?

A. Yes.

Q. And did that involve the filling out of forms for the CAA? A. Yes.

Q. Did you, yourself, assist in the preparation of those forms? A. Yes.

Q. And after the completion of the examination, did you at times mail those forms yourself?

(Testimony of Esther S. Villars.)

A. That I don't recall.

Mr. Avakian: I think that is all.

(Witness excused.)

Afternoon Session—April 2, 1956. 1:30 P.M.

Defendant present with counsel. Presence of the jury stipulated.

MRS. PHYLLIS DUPUIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Phyllis Dupuis.

Q. Where do you reside, Mrs. Dupuis?

A. Philadelphia.

Q. What was your maiden name?

A. Phyllis Irene Kelley.

Q. Do you bear any relation to the defendant?

A. Yes.

Q. What? A. Sister.

Q. Mrs. Dupuis, was the Hubbardsville, New York farm owned by your parents? A. Yes.

Q. Did you reside there? A. Yes.

Q. Do you know whether or not that property is still in the possession of your parents?

A. No, it is sold.

Q. When was it sold? [215]

A. In '51 or '52.

Q. '51 or '52—how much was it sold for?

(Testimony of Mrs. Phyllis Dupuis.)

A. Twelve thousand.

Q. Do you know what happened to the proceeds of the sale of the farm? A. Yes.

Q. What was that?

A. My mother was the only one left.

Q. And she received the proceeds?

A. She received the proceeds.

Q. Now do you recall whether or not there was in existence a farm owned by her parents or family? A. Yes, her parents.

Q. Do you recall when that was sold by the family?

A. I can't recall the exact date.

Q. Approximately?

A. Approximately 1930.

Q. Now, Mrs. Dupuis, I will show you government's Exhibit 15. Government's Exhibit 15 consists of two bank account signature cards, the top one has "temp" (temporary) at the top of it. I will ask you to look at that signature on that card and I will ask you if that is your signature?

A. That is my name.

Q. I realize that is your name. Did you write that? A. No. [216]

Q. Now will you look at the top card and I will ask you if that top card contains your signature? A. Yes.

Q. Where were you when you signed that?

A. In Philadelphia.

Q. What date does it bear?

A. May 5, 1948.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Now I will show you plaintiff's Exhibit 14, together with No. 15. No. 14 is a ledger account in the name of Phyllis Irene Kelley, Hubbardsville. The account is in the Security First National Bank of Reno, Reno, Nevada. I will ask you if any of the funds in that account belonged to you?

A. No.

Q. Do you know to whom they belonged?

A. My brother.

Q. Did he tell you he was opening an account for you in the Reno Security National Bank?

A. No.

Q. Did he tell you he was putting the account in your name? A. Yes.

Q. Now I will show you government's Exhibit 16, deposit slips. I will ask you what deposit slips, if any of them, were made by you? A. No.

Q. Now, Mrs. Dupuis, I have here a Security National Bank of [217] Reno, Nevada, savings withdrawal ticket, dated July 14, 1950, and a check drawn on Phyllis I. Kelley in the sum of \$8896.21, dated July 14, 1950, cashier check on the Security National Bank, plaintiff's Exhibit No. 18, and I will ask you first to refer to the savings withdrawal ticket, and I will ask you if the signature on that ticket is in your handwriting? A. No.

Q. Did you write in the amount up here, \$8896.21? A. No.

Q. Do you recognize that handwriting?

A. My brother's.

Q. Which brother is that? A. Wayne.

(Testimony of Mrs. Phyllis Dupuis.)

Q. You also have a brother by the name of Winfield? A. Yes.

Q. Now I will show you cashier's check. I would like to know if that is your endorsement on the back of that check? A. Yes.

Q. Did you put the words on there, "Pay to the order of Wayne P. Kelley" in typewriting above your signature? A. No.

Q. Do you know who did? A. My brother.

Q. Do you recognize his signature underneath your signature? A. Yes. [218]

Q. Now do you recall where you were on July 11, 1950?

A. I believe I was at home, Hubbardsville.

Q. Do you know how you got that check to endorse it? A. By my brother.

Q. And did you return it to your brother after you had endorsed it? A. Yes.

The Court: I take it when the expression "my brother" is used, unless stated to the contrary, you are referring to Dr. Wayne Kelley?

A. Yes.

Q. Now, Mrs. Dupuis, it has been stipulated into evidence in this case the existence of balances in several savings accounts in New York State banks. These accounts were in your name and in the name of your brother, Winfield O. Kelley. Do you know the accounts to which I have reference?

A. Yes.

Q. Were the funds in those accounts your funds? A. No.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Do you know whose funds they were?

A. Well, Wayne's.

Q. Did you ever have a pass book for those accounts? A. No.

Q. Did your brother ask you to have those accounts in your name? [219] A. No.

Q. Do you recall the approximate date of the first savings account taken out in your name or the name of your brother, Winfield O. Kelley, by Dr. Wayne P. Kelley? A. I don't recall the date.

Q. Would it have been during the time he was in the service? A. No.

Q. Was it subsequent to the time he was in the service? A. Yes.

Q. It would be subsequent to 1946?

A. Yes.

Q. Now did you ever have custody of an amount of currency other than those savings accounts belonging to your brother, Wayne P. Kelley?

A. No.

Q. Did you ever see any currency, other than these savings accounts, which belonged to your brother, Wayne P. Kelley? A. No.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Lobse): Mrs. Dupuis, were you born in Hubbardsville, New York? A. Yes.

Q. And if you don't mind stating, what was the year of your birth? A. 1918. [220]

Q. And how much younger would you be than

(Testimony of Mrs. Phyllis Dupuis.)

Dr. Wayne Kelley? A. Thirteen years.

Q. Where did you receive your education?

Mr. Maxwell: May it please the Court, I do not think this has any reference to the direct examination and if counsel desires to make this his witness, that is satisfactory at the proper time. It is all immaterial in the first place.

The Court: The Court will permit it.

Q. Mrs. Dupuis, in response to question asked by Mr. Maxwell, I believe you stated your parents owned the farm, it was sold in about 1951?

A. Yes.

Q. And if you know, about how much in acreage did that farm consist of?

A. One hundred thirty acres.

Q. Do you know whether the entire 130 acres was tillable?

A. About 100 acres was tillable.

Q. Did your mother, after your father's death, undertake to cultivate that property, prior to the sale? A. Yes.

Q. Did she operate that farm herself for any length of time after his death?

A. Up until it was sold.

Q. When did your mother pass away?

A. February this year. [221]

Q. You testified, in connection with questions Mr. Maxwell asked you in regard to Exhibits 14, 15, and 16, signature cards on bank account in the Security National Bank of Reno, Nevada, that one of them contained your signature, did it not?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes.

Q. And the other your name, but you had not signed that card? A. Yes.

Q. At the time, Mrs. Dupuis, that you signed that card, had you had any discussions with your brother Wayne, concerning the request which he made—any explanation from him of the reasons why he asked you to do so?

A. I have a letter.

Q. In substance do you recall the nature of the communication?

Mr. Maxwell: Your Honor, I do not believe any proper foundation has been laid in the first instance; in the second instance, it sounds to me a great deal like this is going to be a self-serving statement.

Mr. Lohse: I think Mr. Maxwell on direct asked Mrs. Dupuis whether or not she had been requested to do so and I am only now trying to determine in what manner that came about.

The Court: You may proceed.

A. By letter my brother sent the card.

Q. At the time he made that request, Mrs. Dupuis, did he state any reason for making that request to you?

Mr. Maxwell: Your Honor, before the letter is read, I [222] would object to it. I would say no proper foundation has been laid for this witness's testimony. The testimony is not the best evidence as it stands now.

Mr. Lohse: I submit, your Honor, Mr. Maxwell

(Testimony of Mrs. Phyllis Dupuis.)

asked that type of information and it went in without objections.

Mr. Maxwell: I merely asked her if her brother had so requested her to sign it. I think that is satisfactory. That does not go into the manner of the request.

The Court: Objection overruled.

Q. Will you then state, please, Mrs. Dupuis, what request or explanation you received from Wayne Kelley for your signature on that card?

A. He wrote me a letter, asking that I sign the card.

Q. Nothing further?

A. The fact that his first wife, he was still having difficulty.

Q. With respect to the accounts which were established in the New York banks, you were asked questions by Mr. Maxwell particularly whether or not any income deposited in the bank accounts standing in your name and your brother Winfield's name were your funds and you said no, is that correct? A. Yes.

Q. In establishing of those funds, Mrs. Dupuis, did your brother, Wayne Kelley, make any request of you? A. Not any than before.

Q. And what were made? [223]

A. What I just mentioned.

Q. The same request in connection with the bank accounts in New York? A. Yes.

Q. And was that the reason why you permitted your name to be used to the bank accounts in New

(Testimony of Mrs. Phyllis Dupuis.)

York and Nevada? A. That is correct.

Mr. Lohse: Your Honor, I have nothing further to offer on cross examination at this time. I would like, with the Court's permission, to approach the bench.

(Conference at bench between Court and counsel.)

Redirect Examination

Q. (By Mr. Maxwell): Mrs. Dupuis, as I recall your testimony on cross examination, you stated that your brother sent you a letter, asking you to sign the signature card which you have in front of you, plaintiff's Exhibit 15? A. Yes.

Q. And in that letter was there any reason expressed why he wanted this account opened?

A. I don't recall.

Q. Do you recall when that letter was sent to you? A. The date the card is.

Q. Do you recall receiving that letter on that date? How can you receive a letter on the date the card is signed? Isn't that the same date on that card? [224]

Mr. Lohse: Your Honor please, I shall offer objection to that. I submit Mr. Maxwell is cross-examining his own witness.

Mr. Maxwell: Your Honor, I believe this is the sister of the defendant.

The Court: Objection overruled.

Q. Did you affix that date on that card?

A. No.

Q. Where were you on that date?

(Testimony of Mrs. Phyllis Dupuis.)

A. Hubbardsville.

Q. Do you recall receiving a letter from Dr. Wayne P. Kelley on or about that date? Do you have a recollection yourself of receiving such a letter?

A. I have a recollection of receiving a letter.

Q. Do you recall what the date of the letter was?

A. Around this time.

Q. Do you recall what the letter said?

A. No.

Q. Do you recall it said anything other than you were to simply sign that card and send it back?

A. That was enough.

Q. You would have done it whether or not any reason was assigned in the letter, is that correct?

A. Yes.

Q. Do you have any positive recollection whether any reason was [225] assigned in that letter?

A. I do not know.

Q. Was there a reason given in the letter, or do you recall?

A. I don't recall.

Mr. Maxwell: You may inquire.

Recross Examination

Q. (By Mr. Lohse): Mrs. Dupuis, the fact that the signature card in the Security National Bank bore your signature, which was sent to you by Dr. Kelley, had you had any prior conversations about funds with your brother, Wayne Kelley, concerning the execution of that card?

A. I recall having one telephone conversation

(Testimony of Mrs. Phyllis Dupuis.)

with my brother Wayne in connection with the card.

Q. When Mr. Maxwell asked whether you would have signed that without your brother Wayne having suggested or evidenced any particular reason, you replied you would have, is that correct?

A. Yes.

Q. And is your reply by reason of the fact that you previously testified on my cross examination that he had had difficulties with his first wife?

A. That is right.

Mr. Lohse: If your Honor please, while conferring with your Honor previously at the bench, it was stipulated between counsel for the government and counsel for the defense that the defense might call Mrs. Dupuis now at this time as a [226] witness in this case and that by calling her at this time it would not constitute a waiver of our right to make any motion which might appear proper at the conclusion of the government's case. With that understanding, I should like, at this time, to examine Mrs. Dupuis as a witness for Dr. Wayne P. Kelley, the defendant.

The Court: The record will show the stipulation and understanding between Court and counsel. The witness is now a witness of the defendant.

Direct Examination

Q. (By Mr. Lohse): Mrs. Dupuis, where did you attend grammar school?

A. Hamilton—pardon me, in Hubbardsville.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Did you attend grammar school for eight years there? A. Yes.

Q. Where did you receive your high school education? A. Hamilton.

Q. How far from Hubbardsville is Hamilton?

A. About five miles.

Q. Did you attend high school there for four years? A. Yes.

Q. Did you graduate from high school in Hamilton? A. Yes.

Q. Thereafter what additional education did you receive? A. Syracuse University.

Q. For how long? [227] A. Four years.

Q. Did you receive any degree?

A. A.B. and I went back for my graduate work.

Q. When did you receive your A.B. from Syracuse University? A. 1938.

Q. And your post-graduate degree?

A. In 1944.

Q. Did that complete your formal education?

A. I have taken graduate courses.

Q. Except for that, however, did that complete your formal education? A. Yes.

Q. What was your occupation after you graduated? A. A teacher.

Q. Where and for how long?

A. Spring Valley, New York for five years and I went back to Syracuse, then Hamilton, New York, taught, and then State Teachers College, back to Syracuse, took specialized work in speech ther-

(Testimony of Mrs. Phyllis Dupuis.)

apy, speech correction, then to Philadelphia and more teaching.

Q. How recently have you taught?

A. Up until I was married.

Q. And you are not teaching then at the present time? A. No.

Q. Mrs. Dupuis, who deferred the cost of your education? [228] A. My parents.

Q. Does that include the education which you received your master's degree and graduate work?

A. No, my under-graduate work.

Q. How far is Syracuse from the family home?

A. About 60 miles.

Q. During the time you attended school there, you remained away from home, did you not?

A. Yes.

Q. And it has been a fact that your parents deferred the cost of your books, your tuition and your living expenses while in college?

A. Yes, except for my doing work on a scholarship basis.

Q. In point of time, during the course of your education, did you have a scholarship?

A. I had a fellowship until I graduated.

Q. After you graduated from college, was there any further study? A. Yes.

Mr. Maxwell: I can't see the relevancy of this line of questioning.

The Court: I assume counsel is going to come to the point.

(Testimony of Mrs. Phyllis Dupuis.)

Mr. Lohse: I submit, your Honor, it is our purpose to tie this line of questioning in.

The Court: Very well, proceed, let us tie it up.

Q. Do you recall the type of farming operations carried on by your father at the ranch at Hubbardsville? A. Yes.

Q. Would you describe it please?

Mr. Maxwell: What date?

Mr. Lohse: Prior to these things, when she was living at home.

Mr. Maxwell: That is what I would like to know, what date?

Q. When do you first recall going to Hubbardsville to live?

A. I was born on the farm in 1918.

Q. And from and after your birth, until you left home to go to school, Mrs. Dupuis, did you have occasion to observe the general activity carried on by your father in connection with the operation of that farm?

A. Yes, I always worked on the farm.

Mr. Maxwell: I object to this line of testimony as being too remote. The government has not presented evidence except as to the years 1948 to 1952. In addition to that, I do not see the purpose.

The Court: I assume, counsel, Mr. Lohse is going to connect this up.

Mr. Lohse: That is my intention, your Honor.

The Court: Go ahead.

Q. You were born in 1918? [230]

A. Yes.

(Testimony of Mrs. Phyllis Dupuis.)

Q. You graduated from college in 1938. For how long a period of time after you graduated from college did you actually reside at home?

A. I lived there all the time.

Q. During that period of time what type of activity, if you know, did your father engage in?

A. Operated the farm, raised produce, such as beans and peas. We sold the products.

Q. Do you recall whether or not, during your life on the farm, your brother, Wayne Kelley, took any part in the operation of the farm with your father? A. Yes.

Q. Will you briefly describe to the jury, if you can, what that part was that you observed?

A. My father carried on the raising, growing of beans and peas, regular farm work, in addition to the dairy farm. They trucked some produce, or rather my brother Wayne trucked the produce, to the Philadelphia and New York markets.

Q. In connection with the actual crops and shipment of the farm produce, Mrs. Dupuis, did your brother ever assist your father in connection with the packaging and marketing of the produce?

A. Yes; wired baskets, bushel baskets of peas and beans that had to be shipped immediately, so they wouldn't spoil.

Q. During the harvest season? [231-233]

A. Yes.

Q. Do you know whether your father ever hired any help on the farm during the harvest season?

A. He hired help the year around.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Generally, if you know, what was your brother Wayne's activities in the matter of cultivation and harvesting and marketing of the crops during the time that you lived on the ranch?

Mr. Maxwell: Objected to as asked and answered.

The Court: It may be answered.

A. He ran the tractor, cultivated, plowed, drove the truck, took care of the dairy, milking, anything that had to be done on the farm.

Q. Mrs. Dupuis, what was the relationship with respect to Dr. Wayne Kelley and your father, so far as all three of you children were concerned, if you know?

A. He was very close to my father; closer than he was to my mother.

Q. Was he closer than Winfield, for example?

A. Yes.

Mr. Maxwell: Objected to as immaterial.

The Court: It has been answered.

Q. What was your relationship to your father?

Mr. Maxwell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lohse: I ask that this be marked.

Mr. Maxwell: Do you intend to offer it in evidence, counsel? [234]

Mr. Lohse: Yes.

Mr. Maxwell: In respect to that, your Honor, may I request the offer of proof in the absence of the jury?

Mr. Lohse: Your Honor, I do not believe it is necessary to excuse the jury. I will make that offer

(Testimony of Mrs. Phyllis Dupuis.)

through another witness, but I do wish to have the foundation laid.

The Court: The Court certainly cannot see any materiality on the part of the offer at this time. Perhaps I don't understand the situation.

Mr. Maxwell: I am sure I don't either.

The Court: There is nothing to prevent the offer being marked for identification, as far as I can see.

Mr. Maxwell: That is perfectly satisfactory.

The Court: The offer will be marked B-1 for identification.

Q. Mrs. Dupuis, I hand you what purports to be a photograph and ask you whether you know what that purports to represent?

Mr. Maxwell: Just a moment. The witness is now going to describe the exhibit to the jury.

Mr. Lohse: I have not asked her to testify what it is, only if she knows what it purports to represent.

The Court: Answer yes or no.

Q. That is correct—can you state whether you know what that represents? [235] A. Yes.

Q. Do you know, Mrs. Dupuis, when the photograph of the object represented on that photograph was taken and by whom? A. Yes.

Q. When was it taken? A. Last summer.

Q. And where? A. In Philadelphia.

Q. And by whom was the photograph taken?

A. Taken by my brother Wayne.

Q. Did the object which that photograph shows

(Testimony of Mrs. Phyllis Dupuis.)

remain in your possession, on the premises in your home in Philadelphia at that time? A. Yes.

Q. And for how long a period of time has that object been in your possession?

Mr. Maxwell: There are a number of objects shown in the photograph.

Mr. Lohse: There is one main object portrayed in the photograph, your Honor. Your Honor has seen the photograph. Your Honor please, we would be happy to make an offer of proof in connection with this photograph, in the absence of the jury, if so desired.

Mr. Maxwell: May it please the Court, I assume this [236] photograph is photograph of object which is presently in existence. That being so, this photograph is obviously not the best evidence. This witness has established its present existence. I think the photograph would not be admissible, not the best evidence and any further testimony about it would be prejudicial.

Mr. Lohse: Your Honor, I hardly think that Mr. Maxwell is really serious in that objection. Photographic evidence is certainly permissible.

The Court: You can't advise the Court on that, counsel. I am familiar with it. We are concerned with the materiality.

Mr. Brown: We invited an offer of proof, your Honor. I think it can be settled if an offer were made out of the presence of the jury.

The Court: Make your offer, gentlemen.

Mr. Brown: Out of the presence of the jury?

(Testimony of Mrs. Phyllis Dupuis.)

The Court: Is it offered in evidence?

Mr. Brown: No, an offer of proof.

The Court: Can you proceed with this witness on some other point?

Mr. Lohse: Yes, your Honor.

The Court: I do not want to deter anything you have in connection with that offer. If you can, I suggest you proceed. [237]

Q. Do you recall, Mrs. Dupuis, when your brother Wayne Kelley was married, the first time?

A. Yes.

Q. And when, if you recall, did that marriage take place?

A. On Christmas Day. I don't remember the year.

Q. Might that have been 1929? A. Yes.

Q. Were you present at the marriage ceremony, Mrs. Dupuis? A. No.

Q. Was your mother there? A. No.

Q. Did your father attend the wedding?

A. No.

Mr. Maxwell: I ask that testimony be stricken; obviously not her own knowledge if she did not attend, how did she know?

The Court: Objection overruled.

Q. Did your father attend?

A. No member of my family.

Q. None of your family attended? A. No.

Q. Did you know Elsbeth Kelley? A. Yes.

Q. That was Wayne Kelley's wife?

A. Yes. [238]

(Testimony of Mrs. Phyllis Dupuis.)

Q. Did you have occasion to visit at their home?

A. Yes.

Q. Do you recall at what time or times you visited with them? A. Not frequently.

Q. How frequently?

A. When I was home on vacation and on week-ends.

Q. Can you tell roughly the years or period over which your visits in their home took place?

A. For three or four years after the marriage. They went to Clinton.

Q. During the early portion of the marriage, then, during the first few years, you actually visited at Wayne Kelley's home? A. Yes.

Q. Did you observe, Mrs. Dupuis, the manner in which the doctor and his then wife got along, during the course of your visits? A. Yes.

Q. How would you say their marital life appeared, as you observed it?

Mr. Maxwell: Object to that as calling for opinion and conclusion of the witness.

Mr. Lohse: She can testify what she saw.

Mr. Maxwell: Furthermore, the matter is certainly immaterial as to any financial matters of Dr. Kelley's during the years 1949 to 1952 or prior; whether or not he got along with his wife, I think is clearly immaterial. [239]

Mr. Lohse: Your Honor, it has a very definite bearing, so far as the defense is concerned.

The Court: The witness may answer if she knows.

(Testimony of Mrs. Phyllis Dupuis.)

A. I know that they didn't get along.

Q. And did you observe conditions?

A. I observed things which took place.

Q. Would you describe them as you observed them?

Mr. Maxwell: Objected to as calling for conclusion.

The Court: Objection sustained. She testified they didn't get along. That is as far as it goes.

Q. Do you know Mrs. Tracy? A. Yes.

Q. Was Mrs. Tracy a frequent visitor at the Hubbardsville farm while you were there as a girl?

A. No.

Q. Do you recall that Mrs. Tracy ever visited there?

A. She may have visited there a few times.

Q. If you know, what was your mother's reaction to Dr. Wayne P. Kelley's marriage to Elsbeth?

Mr. Maxwell: Objected to as calling for conclusion, calling for hearsay.

The Court: Objection sustained.

Q. May I ask this question—what reaction did you, as a family, have to the marriage of Dr. Kelley to Elsbeth?

Mr. Maxwell: Same objection. Calls for hearsay; [240] calls for conclusion.

The Court: Well, I think the witness can testify generally as to the family reaction. She was a part of it and that is a very definite thing.

Mr. Lohse: That was the manner in which I thought I had raised it, your Honor.

(Testimony of Mrs. Phyllis Dupuis.)

Q. Can you answer the question? A. Yes.

Q. What was that?

A. I would say that my mother——

Mr. Maxwell: Objected to as not responsive.

The Court: Your family.

A. My family was very much opposed to the marriage.

Q. Do you know, Mrs. Dupuis, whether or not your mother actually became ill as a result of that marriage?

Mr. Maxwell: Objected to as leading question.

Mr. Lohse: It is a question of fact whether she knows or doesn't know.

The Court: She can answer yes or no.

A. Yes.

Q. How large a home was there on the ranch at Hubbardsville, or farm, how many rooms?

A. Fifteen or 17 rooms.

Q. Do you recall that there ever was on the family homestead at Hubbardsville a depository or safe for safekeeping of valuable documents? [241]

A. Yes.

Q. Where was that located in the home specifically?

A. It was located in a closet of a bedroom.

Q. Were any of your valuables kept there?

Mr. Maxwell: Objected to as immaterial.

The Court: The witness may answer.

A. There were valuables——

The Court: The question was, were any of your valuables kept there?

(Testimony of Mrs. Phyllis Dupuis.)

A. My valuables, after 1948, 1949, my mother's papers and mine were kept there.

Q. Do you know, from time to time, what papers, other than those you have just mentioned, were left there, that is, belonging to yourself and your mother, in the place of safekeeping in Hubbardsville?

A. Before that time?

Q. Yes.

A. My brother Wayne had a safe in which he kept papers, and my father.

Q. Do you know where the safe you just mentioned presently is?

A. The safe is in my possession.

Q. Do you recall when, in point of time, Dr. Wayne Kelley removed any of his personal property?

Mr. Maxwell: If she knows. [242]

Mr. Lohse: If she knows.

A. When he came back from the service in 1946 or 1947.

Q. And when did the safe actually come into your possession?

A. My possession?

Q. Yes.

A. At the time that we sold the property.

Q. When you say the property, do you have reference to the sale of personal property?

A. The farm.

Q. That was in 1951?

A. 1951.

Q. And it has been in your possession since that time?

A. Yes.

Q. And still is in your possession?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes.

Q. That is in Philadelphia, your present home?

A. Right.

Q. Mrs. Dupuis, has your mother's estate been probated? A. It is in the process now.

Q. And if you know, who is named as executor of that estate, or executrix?

Mr. Maxwell: May it please the Court, I would like to object to the materiality of this testimony.

The Court: Objection overruled.

Q. Answer the question. [243]

A. I am the executrix.

Q. Mrs. Dupuis, I hand you a document consisting of three sheets and I ask you to state, please, if you know, what that document is.

A. My mother's will. It is a copy of it.

Mr. Lohse: Your Honor please, I should like to offer a copy of the will next in order.

Mr. Maxwell: Your Honor, I have no objection as to the authenticity of the document. I do object to it on the ground the document is not material or relevant to the proceedings.

Mr. Lohse: May I be heard, your Honor?

The Court: The objection is very well taken. The Court will permit it to be marked. That will be received in evidence as defendant's Exhibit C.

Q. Mrs. Dupuis, do you know of what the nature of your mother's estate consists; in other words, what property did she leave at her death?

A. She had a few stocks.

Q. Are you able to state, with any degree of

(Testimony of Mrs. Phyllis Dupuis.)

certainty, the number? A. Shares of stocks?

Q. Yes.

A. Twenty-six; approximate value of all of her personal estate, four or five thousand dollars. [244]

Q. Were those shares all one company, or are they varied?

A. I think there were two, Philadelphia Electric and Lide Limited.

The Court: Mrs. Dupuis, you said the value of your mother's personal property was four or five thousand dollars. Do you mean all the personal property or just the stocks?

A. Stocks, plus any other personal property. It had nothing to do with the real estate.

The Court: I wondered if you were putting five thousand dollars on the stock only or all the personal property. I think now it goes to all personal property.

A. Yes; as yet I am not in a position to know, but I think approximately five thousand dollars.

Q. These items, I understand, are to be probated? A. Yes.

Q. In addition to that, did you and your mother own, at the date of her death, any other property in joint tenancy or otherwise?

A. Joint savings account.

Q. Will you state, if you know, what the amount of that joint savings account was?

A. Twenty-five thousand dollars, which includes sale of the farm. [245]

Q. Was there any other joint savings account?

(Testimony of Mrs. Phyllis Dupuis.)

A. No other joint savings account.

Q. Are there any other joint tenancies? Did your mother own any other property in joint tenancy?

A. Bonds.

Q. What kind of bonds?

A. Government bonds.

Q. If you can recall, how many?

A. The approximate value of five thousand dollars, which were jointly owned or some which were my own.

Q. Other than that there was no other property that belonged to you and your mother which you had in joint tenancy?

A. No.

Q. At the time of her death?

A. No.

Mr. Lohse: With the Court's permission, I should like to read defendant's Exhibit C to the jury.

The Court: You may.

Mr. Lohse: Exhibit C; second sheet;

"I, Iva P. Kelley, residing in the Town of Hamilton, County of Madison, and State of New York, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my Last Will and Testament in manner and form following, that is to say: [246]

"First: I hereby revoke any and all wills and codicils heretofore executed by me.

"Second: I direct that all my just debts, fyberak and testamentary expenses be paid as soon as practicable after my decease.

(Testimony of Mrs. Phyllis Dupuis.)

"Third: I hereby give and bequeath to my son, Wayne, the sum of \$500.00.

"Fourth: I hereby give, bequeath and devise all the rest of my residue and remainder of my estate, both real and personal, to my daughter, Phyllis, and my son, Winfield, to share and share alike.

"Fifth: I direct that there be no public auction of any of my property whatsoever.

"Sixth: I nominate, constitute and appoint as the executrix of this, my Last Will and Testament, my daughter, Phyllis Irene Kelley, and direct that no bond nor security be required from her for action in that capacity, and she shall have full and complete authority in her discretion to sell, mortgage and pledge any property and asset of my estate at such times and by such methods as to her may seem expedient.

"In Witness Whereof, I have hereunto subscribed by name the 28th day of August, in the year [247] Nineteen Hundred and Fifty-one.

"Iva P. Kelley (L.S.)"

To speed things up, your Honor, and with the permission of counsel, I should like to omit the witnessing portion of the will.

Mr. Maxwell: So stipulated.

Mr. Lohse: Only to make mention of the fact that this instrument is signed on the 28th of August, 1951, was certified to by two witnesses, Benedetta M. Carroccio and Joe Schapiro on the 28th of August, 1950, and then the codicil to the will which is attached to the exhibit:

(Testimony of Mrs. Phyllis Dupuis.)

(Reads.)

“Codicil to Will

“I, Iva P. Kelley, residing in the Town of Hamilton, County of Madison, and State of New York, being of sound mind and memory, do hereby make, publish and declare the following as a codicil to my certain Last Will and Testament, dated August 28, 1951:

“First. I hereby annul and revoke the bequest made as follows: ‘I hereby give and bequeath to my son, Wayne, the sum of \$500.00.’

“Second: In all other respects, I do hereby ratify and confirm my said Last Will and Testament, dated August 28, 1951. [248]

“In Witness Whereof, I have hereunto set my hand and seal this 15th day of January, 1953.

“Iva P. Kelley (L.S.)”

Following which is the usual provision for witnesses and the fact that the witnesses signed in the presence of each other.

(Jury admonished and recess taken at 2:45 p.m.)

3:00 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MRS. DUPUIS

resumed the witness stand on further

Direct Examination

Q. (By Mr. Lohse): Mrs. Dupuis, was your mother during the time you lived in Hubbardsville,

(Testimony of Mrs. Phyllis Dupuis.)

engaged in any business on her own account?

A. Yes.

Q. What was the nature of that business?

A. She bought and sold antiques.

Q. If you know, can you state over what period of time your mother engaged in that antique business?

A. Twenty-five years.

Q. Do you know, Mrs. Dupuis, to what extent, in general terms, did she engage in the antique business?

A. She managed and she had exhibits and the proceeds helped me through school.

Q. Did your brother Wayne, if you know, take any part in the [249] operation of the antique business which your mother engaged in?

A. He drove a truck or a car, trucking home furniture and transporting one thing or another.

Q. That is, totalling up generally, Mrs. Dupuis, there was a constant activity in your house over a 24-hour period?

A. That, in addition to being a farmer's wife.

Q. Were any antique items of furnishings left at Hubbardsville when the farm was sold, Mrs. Dupuis, at the farm?

A. No.

Q. Was there a disposition made of any antiques prior to your mother's death?

A. She kept in storage antiques, family pieces that were more valuable, so in case anything happened to the farm I would have them, to preserve them.

Q. What happened in fact to the storage pieces?

(Testimony of Mrs. Phyllis Dupuis.)

A. I have them in my possession.

Q. Are they in your home in Philadelphia now?

A. Yes.

Mr. Lohse: You may examine.

Cross Examination

Q. (By Mr. Maxwell): Now, I believe you testified that during the period 1914 to 1938 your mother and father ran a dairy farm and had produce, such as beans and peas on the farm as well, is that correct? A. Yes.

Mr. Avakian: I believe Mr. Maxwell has the date [250] wrong. The witness testified she wasn't born until 1918.

The Court: The witness is familiar with the dates. She may correct it.

Q. Is that correct?

A. I was born in 1918. The farm was in operation in 1914.

Q. Were you born on the farm? A. Yes.

Q. And was Wayne born on the farm as well?

A. I believe he was born in Hubbardsville, not on the farm.

Q. When was he born?

A. Thirteen years before me.

Q. Then when your brother Wayne started to medical school in 1928, how old were you?

A. I was ten.

Q. And how old were you at the time your brother Wayne was married on December 25, 1929?

A. Eleven.

(Testimony of Mrs. Phyllis Dupuis.)

Q. And how old were you when your brother Wayne entered medical practice in 1933?

A. Fifteen.

Q. Now let us go back to the time you were ten years old. Can you tell me how much of your farm was under cultivation in 1928?

A. I would say as much as was capable of being under cultivation.

Q. At that time you were in about the fourth grade of school, is [251] that correct?

A. I believe the fifth grade.

Q. Did you work on the farm at that time?

A. I did.

Q. Did your brother work on the farm in 1928?

A. Yes.

Q. All the year? A. Yes.

Q. I believe there is testimony here that he went to medical school in 1928.

A. He went to medical school after he finished Colgate. He graduated from Colgate in 1926 or 1927, went back to Colgate and took his masters, his M.A.; at that point he went to medical school.

Q. Is that about 1928? A. Approximately.

Q. Did he work on the farm all during the year 1928? A. When he wasn't at medical school.

Q. How about the year 1929? This would be when you were eleven years old.

A. I believe he was doing trucking.

Q. Well, was he going to medical school in 1929?

A. Yes. During the summer.

Q. During the summer he did trucking?

(Testimony of Mrs. Phyllis Dupuis.)

A. Yes. [252]

Q. How about 1930, when you were twelve years old?

A. I can't remember the exact number of years he was occupied in trucking.

Q. He was occupied in trucking? A. Yes.

Q. Do you know what kind of truck he used?

A. When he was on the farm, he used, as I said, the car converted into a truck, an old Studebaker, but then he purchased a truck to haul produce to New York. The kind I don't know.

Q. Isn't it a fact in 1930 he began trucking for the first time, he purchased a Ford truck to haul produce, is that correct?

A. He purchased a truck.

Q. And that was the first year that he did any produce hauling?

A. He did produce hauling before that in a small way.

Q. And when did he do that, in the summer time? A. Yes.

Q. He was in Colgate University most of that time, teaching and going to school, wasn't he, prior to 1930 and 1928? A. Yes.

Q. So the only work he had was during the summer?

A. And when he got home from college. He lived at home when he went to Colgate.

Q. Do you remember when he started to Colgate?

(Testimony of Mrs. Phyllis Dupuis.)

A. Colgate was four years straight, that would be 1923 to 1927. [253]

Q. How old were you at that time?

A. Very young.

Q. Five years old? A. Yes.

Q. Do you recall when he started in Colgate?

A. I know when he went to Colgate.

Q. Do you recall it? A. Yes.

Q. Do you recall what he did that summer when you were five years old?

A. I recall he worked whenever he was at home.

Q. He worked on the farm, didn't he?

A. Yes.

Q. For your folks? A. Yes.

Q. And he wasn't paid anything for that, was he?

A. Yes, my father and he sold things, they divided the proceeds.

Q. And this was during the time you were five years old. Did you ever see them divide the proceeds when you were five?

A. They did it from that period on.

Q. Did you ever see them, when you were five years' old, divide the proceeds?

A. I don't recollect the exact time. They did.

Q. You remember they did. As a matter of fact, that is what [254] your brother told you, isn't that correct? A. No.

Q. Now where did you reside in 1930 when you were twelve? A. On the farm.

Q. During most of that year your brother was in medical school, am I correct? A. Yes.

(Testimony of Mrs. Phyllis Dupuis.)

Q. And he was married, was he not?

A. Yes.

Q. Did he come home during the summer vacation with his wife?

A. No, they visited; they didn't live at home.

Q. Do you know where they did live?

A. Hamilton.

Q. With Mrs. Tracy? A. I presume so.

Q. Now, I think you testified you assisted in wiring the baskets of produce sent to the market, is that correct? A. Yes.

Q. When was that?

A. Oh, I would say when I was nine, ten—8, 9, 10, 11, 12, up until I was 15.

Q. That would be about 1926 up through about 1929, is that correct?

A. I did other things besides wire baskets.

Q. How much pay did you receive? [255]

A. I received enough to get through college.

Q. Did you put it way in your savings account?

A. I did work on my own——

Q. I am not speaking of work on your own. I am speaking about work you did on the farm, wiring baskets and sending produce to the market.

A. No, I didn't get so much pay; I didn't expect to.

Q. Now you visited frequently, you say, your brother Wayne Kelley and his wife? A. Yes.

Q. When did you make your first visit to them, if you recall, bearing in mind that they were married on December 25, 1929?

(Testimony of Mrs. Phyllis Dupuis.)

A. When Wayne began practicing medicine.

Q. That was after he finished medical school, approximately 1933 and 1934? A. Yes.

Q. When did your father die?

A. 1952, in June.

Q. Had he been in good health until that time?

A. No, he hadn't.

Q. How long had he been in poor health?

A. Oh, two or three years.

Q. And your mother died, I believe you testified, early this year? A. Yes. [256]

Q. Where did she die? A. In Connecticut.

Q. Was she in an institution at that time?

A. She was.

Q. How long had she been in the institution?

A. Two years.

Q. She was incompetent, I believe? A. Yes.

Q. Now while your brother worked on the farm, during the years he was in medical school, 1928 to 1932, do you know if he made thirty thousand dollars a year in the work he did on the farm?

A. I don't know the exact amount.

Q. Do you think it would be possible for him to make thirty thousand dollars a year trucking produce in the summer time?

A. It would be possible.

Q. Do you know how your brother bought his truck?

A. Out of his own money.

Q. Do you know whether or not he borrowed money to buy the truck?

(Testimony of Mrs. Phyllis Dupuis.)

A. He borrowed money from a man.

Q. Who was that please?

A. His name was Still.

Q. Do you know how much money he borrowed from Mr. Still? Did he make a down payment on the truck? A. No. [257]

Q. Now Wayne P. Kelley is your brother, you would do nothing to hurt him, is that correct?

A. No.

Q. Now, I believe you said, Mrs. Dupuis, that you had a joint savings account of approximately \$25,000, is that correct? A. Approximately.

Q. You and your mother? A. Yes.

Q. Do you still have that savings account?

A. Yes.

Q. Did you tell Mr. Brown on the telephone you did not have sufficient money to make the trip out here and asked to have advance made to you?

A. Yes.

Q. And you got advance from the United States marshal to make the trip out here? A. Yes.

Mr. Maxwell: That's all.

Redirect Examination

Q. (By Mr. Lohse): Mrs. Dupuis, you mentioned on cross examination, in response to question by Mr. Maxwell, concerning Dr. Kelley and his borrowing, do you recall at least on one occasion he had borrowed from Mr. Still; where did Mr. Still live, do you know? A. Hamilton.

Q. Do you know when, in point of time, that

(Testimony of Mrs. Phyllis Dupuis.)

loan was made, do [258] you know the year?

A. No; he was in medical school.

Q. Could it have been during the summer of 1930, the year just following his marriage to Elsbeth, his wife?

Mr. Maxwell: The government will stipulate to that, counsel.

Mr. Lohse: We will accept that stipulation, your Honor. We have nothing further.

(Witness excused.)

Mr. Maxwell: Now, may it please the Court, we have one other stipulation with respect to those government bonds owned by Wayne P. Kelley at the beginning of the year 1949 and at the end of that year, end of 1950 and 1951 and end of year 1952. These bonds are all listed individually in a schedule. This schedule is summarized upon a separate sheet of paper, showing the amounts on hand at the end of the year 1948, the amounts purchased during the year 1949, amounts cashed during the year 1949, and amounts on hand at the end of the year 1949. That is done for each year, so it is a summary of purchases, sale and amounts on hand shown on a typed sheet of paper.

It has been stipulated between counsel for the government and counsel for the defendant that these are the war bonds owned by the defendant, Wayne P. Kelley, for the dates shown therein. I will offer these schedules in evidence as government's exhibit next in order. [259]

Mr. Lohse: No objection to their admission.

The Court: The offer will be received in evidence as government's Exhibit No. 118.

Mr. Maxwell: May it please the Court, at this time I would like to read the summary sheet to the jury, Exhibit 118.

(Reads)

Wayne P. Kelley

Summary of U. S. Government Bonds

		Year End Balance
On Hand December 31, 1948 ..	29,400.00	29,400.00
Purchased—1949	3,000.00	
	<u>32,400.00</u>	
Cashed—1949	750.00	
On Hand December 31, 1949 ..	31,650.00	31,650.00
Purchased—1950	3,000.00	
	<u>34,650.00</u>	
Cashed—1950	24,862.50	
On Hand December 31, 1950 ..	9,787.50	9,787.50
Purchased—1951	0	
	<u>9,787.50</u>	
Cashed—1951	7,537.50	
On Hand December 31, 1951 ..	2,250.00	2,250.00
Purchased—1952	0	
	<u>2,250.00</u>	
Cashed—1952	0	
On Hand December 31, 1952 ..	<u>2,250.00</u>	<u>2,250.00</u>

Mr. Maxwell: Your Honor, at this time we have the revenue agent that we can put on as a witness. Other than that, we have, for all practical purposes, run out of witnesses this afternoon. [260]

HARRY M. GREEN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, sir? A. Harry M. Green.

Q. Where do you reside?

A. Sparks, Nevada.

Q. How long have you resided there?

A. Five years.

Q. What is your occupation, sir?

A. I am an Internal Revenue agent.

Q. Where are you stationed?

A. Reno, Nevada.

Q. How long have you been stationed there?

A. Six years.

Q. Prior to that time, what was your occupation? A. I was also Internal Revenue agent.

Q. When did you become an Internal Revenue agent? A. March 1, 1946.

Q. Mr. Green, did you attend the university?

A. Yes, I did.

Q. What university was that?

A. University of Denver.

Q. Did you receive a degree from the university? A. I did. [261]

Q. What degree was that?

A. What they called a Bachelor of Science, an accounting degree.

Q. When did you receive it?

A. The early part of 1946.

(Testimony of Harry M. Green.)

Q. Prior to that time, I believe you testified you became an Internal Revenue agent in March, March 1, 1946? A. That is correct.

Q. Prior to that time what was your occupation?

A. Three and one-half years I had military service. Prior to that time I had two accounting jobs, while going to school.

Q. What was your rank in the military service, what branch?

A. United States Army. I was a sergeant.

Q. Now what are your duties generally, Mr. Green, as Internal Revenue agent?

A. Roughly speaking, there are two. Our job is to make an audit of the income tax returns of various individuals, corporations, partnerships, fiduciaries, whatever is assigned to us, to determine that the correct tax liability has been paid, and then we write a report as to the result.

Q. I take it you have performed many of these audits since March 1, 1946? A. Yes, sir, I have.

Q. Now in the course of your duties as Internal Revenue agent, did you have occasion to investigate the income tax liabilities of Wayne P. Kelley for the years 1949 to 1952? [262] A. Yes, I did.

Q. Can you state, if you know, how the investigation of Dr. Kelley, inquiry into tax liabilities, arose? A. Yes, I can.

Q. And will you state what that was?

A. In the early part of 1951 I had occasion to go to Dr. Kelley for treatment and during those

(Testimony of Harry M. Green.)

treatments I gave the office girl a personal check for the treatments. When the check was returned to me by the bank, I noticed that the checks had all been cashed.

Q. How could you tell that?

A. This particular bank, the First National Bank of Nevada, First and Virginia Branch, uses a stamp, sort of a printed stamp, on the face of the check if they cash the check.

Q. Now let me see if I can find a check here for you that shows that mark. Well, here is a check, plaintiff's Exhibit 82. See if you can find the mark you are talking about on that.

Mr. Avakian: I would suggest it would be better to use Mr. Green's checks. That is the one called to his attention.

The Court: This is just to identify.

A. The first two checks I look at do have this particular stamp on them, represents the checks being cashed.

Q. Will you describe the mark to the jury?

A. Yes. This particular bank, which is the First and Virginia [263] Branch of the First National Bank, uses a—you wouldn't exactly call it a square-printed on the face of the check, and underneath it, in the square itself, would be 94-2, which happens to be the identifying number of the bank. Then underneath it usually there would be a "111", which means that the check was cashed.

Q. Now, do you have you checks with you?

A. I do.

(Testimony of Harry M. Green.)

Q. May I see those checks please? Now you have handed me as well a piece of paper. I will give you that back and I wonder if you will describe the document that you have handed me?

A. Yes. The first item I have here is a check drawn by me on May 2, 1951, to the order of Dr. Kelley, in amount of five dollars. It has a stamp on the face of it—the check is written by me and signed by me—it has a stamp on the face of it; in this particular instance it does not have the “111” symbol. However, the bank sometimes puts “111” and sometimes does not. The next document is merely a receipt with a number, signed by Helen Hill for the same amount, same thing. The document here is a check, also drawn by me, dated May 7, 1951, payable to Dr. Kelley, in the amount of \$20. This also has a stamp on it. Following is an unnumbered receipt of the same date and for the same amount. The final item I have here is a check written by me, payable to the order of Dr. Wayne P. Kelley, in the amount of \$10, dated May 17, 1951, and in this particular instance it [264] does have the number “111” underneath.

Q. Now these checks were given to Dr. Kelley in payment of medical services?

A. They were given to the office girl in payment of services, yes.

Q. Did you make any other payments during the years 1949 and 1952 to Dr. Kelley?

A. No, I did not.

Q. These were the only ones?

A. Yes.

(Testimony of Harry M. Green.)

Mr. Maxwell: I will offer these checks in evidence as government's next in order, including the receipts thereto.

Mr. Lohse: No objection, your Honor, to the admission in evidence.

The Court: The offer will be received as government's Exhibit 119.

Q. Mr. Green, I stopped you in the middle of your story about how the investigation arose. I wonder if you would continue. I think you said you noticed the checks were cashed?

A. That is correct. At that particular time, even now, our job is to keep an eye out, or possibly check out, any individuals or firms that we think require a little further checking when they are in the habit of cashing their receipts, as in this particular case. Then we went over to what they called the Collector of Internal Revenue at that time, at the postoffice [265] and endeavored to find out who had the 1949 and 1950 returns of Dr. Kelley. It is part of our job to make a personal check on any taxpayer that we have a question about. We found that one year's return, I believe it was 1949, had been picked up by the office auditors there in the Collector's office because the doctor had claimed depreciation and expenses of an airplane in connection with medical practice. It appeared to me——

Q. I would like to have you testify as to what you did and in that connection what was done, rather than your conclusions.

(Testimony of Harry M. Green.)

A. I suggested to the Collector's office at that time that the returns should be probably assigned to the San Francisco Internal Revenue agent's office and then reassigned to one of the agents in the Reno office.

Q. Now the Internal Revenue agents were different at that time from the Collector, is that correct?

A. That is correct.

Q. That was a different agency?

A. That is right. The Collector's office handled smaller returns. The agent's office handled larger returns. This seemed to be a larger type of returns, that is why I suggested it be sent to San Francisco.

Q. Was it then assigned to your office for audit?

A. It was.

Q. And did you have the investigation at that time? [266]

A. No, I did not.

Q. Was it assigned to you?

A. No sir, it was not.

Q. When was it assigned to you, sir?

A. In approximately January or February of 1953.

Q. Did you do anything on the case prior to the time it was assigned to you?

A. The only thing I did on the case was to sit in at an interview which was prepared by the agent when the first assignment came in.

Q. Who was that, do you know?

A. Vern C. Heppner.

(Testimony of Harry M. Green.)

Q. I believe you said you sat in on an interview with him?

A. With him and the doctor, I did.

Q. Do you recall when that interview was?

A. Yes, I do.

Q. When was it?

A. It was on February 29, 1950.

Q. Where was the interview held?

A. It was held in the agent's office, which was in Room 302, Clay Peters Building, Reno.

Q. Who was present?

A. There were just the three of us, Mr. Heppner and the doctor and myself.

(Jury admonished and recess taken at 4:30 p.m.) [267]

Tuesday, April 3, 1956

10:00 a.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: There was a witness on the stand on the part of the government, Mr. Green.

Mr. Maxwell: Yes, your Honor. With the permission of the Court and counsel, we would like to withdraw that witness at the present time and recall a witness for just a short piece of testimony and also for one stipulation.

Mr. Lohse: We will be very happy to cooperate on that basis.

The Court: Very well, counsel, you may proceed.

Mr. Maxwell: A further stipulation has been

made between the parties to this matter, to the effect that a representative of the Home National Bank of Eureka, Kansas, if called as a witness, would testify that there was one commercial deposit with the Home National Bank at Eureka, Kansas, in the name of Lois W. or Lillian Kays on the following dates and in the following amounts: December 31, 1948, \$226.20, December 31, 1949, \$202.40.

It is further stipulated that a representative of the Ultra K Distributing Company, if called as a witness, would testify that the records of the Ultra K Distributing Company, 315 Sansome Street, San Francisco, California, disclose that Dr. [268] Kelley invested \$20,000 in this enterprise in October of 1952 and that this investment was still retained on December 31, 1952.

It is further stipulated that a representative of the Federal Water and Gas Company, if called to testify, would state that Dr. Kelley owned 60 shares of the stock of the Federal Water and Gas Company on December 31, 1948, at a cost of \$1050, and that this stock continued to be owned by Dr. Kelley up to and including December 31 of 1952. Is that correct, counsel?

Mr. Lohse: That is right.

Mr. Maxwell: Your Honor, those stipulations and the two stipulations with respect to bank accounts in New York, which were read heretofore into the record, have been made the subject of a typewritten piece of paper and the copy I have is a little bit dog-eared, but with the Court's permis-

sion, I will have it retyped and made an exhibit in this case.

Mr. Avakian: That is agreeable. Would the Court like to have the exhibit number now?

The Court: Do you wish that done, counsel?

Mr. Maxwell: That will be satisfactory, your Honor.

The Court: The offer will be received in evidence in retyped form and will be marked government's Exhibit 120. [269]

VERNON HEPPNER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name please? A. Vernon Heppner.

Q. What is your occupation?

A. I am a certified public accountant.

Q. What was your occupation in 1951 and 1952?

A. Internal Revenue Agent.

Q. Have you been subpoenaed to testify in this matter? A. Yes, I have.

Q. Mr. Heppner, may I call your attention to the year 1951 and ask you if you were assigned any investigation of income tax returns of Dr. Wayne P. Kelley? A. Yes, I was.

Q. Do you recall when those returns were assigned to you for investigation?

A. I believe it was during the month of September.

(Testimony of Vernon Heppner.)

Q. 1951? A. 1951.

Q. And did you talk to Dr. Kelley at any time during the year 1951? A. Yes.

Q. Did you have occasion to examine any of the records of Dr. Kelley during that year? [270]

A. Yes.

Q. Can you tell me the occasion of your first visit to Dr. Kelley, what happened and what you did?

A. Well, I think it was a routine matter. I made a telephone call and talked to the doctor and made an appointment, and as I recall, I believe I went over to his office the first time I met him.

Q. Had you talked to Mr. Green previous to that time about the case?

A. I don't recall about that.

Q. I wonder if you can tell us what occurred at the doctor's office?

A. Well, I asked to see—I had the returns and I asked to see the records and see what records he had and try to substantiate the figures on the return.

Q. And did he show you the records?

A. Well, I don't recall now whether the records were at the office or whether they were kept at his home, but I know at that time we had a discussion and I think I looked those records over.

Q. Did you ever have occasion, between that time and January, 1952, to look over the patient cards and receipts by the doctor?

A. Yes, I did.

(Testimony of Vernon Heppner.)

Q. Did you ask for one patient card in particular? A. I did.

Q. What patient card was that? [271]

A. Mr. Harry Green.

Q. Were you able to find that card?

A. No, sir.

Q. Did you look through all of the cards at that time that were made available to you by the doctor?

A. I believe I did, yes.

Q. Now in your conversations with Dr. Kelley, did you ask him for any information with respect to his assets and liabilities?

A. Yes, I did. I asked him for financial statements.

Q. When did you ask him for that, if you recall?

A. I believe it was some time prior, shortly around Christmas, 1950.

Q. Did the doctor furnish you with such information? A. Yes, he did.

Q. How did he furnish that, orally?

A. No, he gave me written statements.

Q. Do you have those statements with you?

A. Yes, I do.

Q. May I have them?

Mr. Lohse: We have no objection to the admission of the number of statements in evidence.

The Court: The statements will be admitted in evidence as government's Exhibit 121.

Q. Now, Mr. Heppner, do you know who prepared those statements?

A. As far as I know, the doctor prepared them.

(Testimony of Vernon Heppner.)

Q. Did you ever talk to an accountant, or any other representative of the doctor's at that time?

A. No, sir.

Q. Did he ever mention such representative?

A. No, sir.

Q. Can you state the date upon which they were furnished to you?

A. It was January 10, 1952.

Q. As of what dates is the information set out on those statements?

A. As of January 1, 1946 and December 31, 1950.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mr. Heppner, when did you leave the Internal Revenue Service?

A. In December of 1952.

Q. And have you been connected with the Internal Revenue Service since then?

A. What do you mean?

Q. Employed by them? A. No, sir.

Q. Or by any other government agency?

A. No, sir.

Q. These documents, Exhibit 121, the net worth statements, were obtained by you in the course of your investigation? A. Yes sir.

Q. Are these supposed to be kept in the custody and for the purpose [273] of the Internal Revenue Service? A. Yes.

Q. Can you explain how it is that you happen

(Testimony of Vernon Heppner.)

to have them this morning when Mr. Maxwell asked for them?

Mr. Maxwell: I can explain that. I gave them to him this morning at ten o'clock.

Q. Do you have any memorandum or reports of any kind, as to the work you did on this matter, or are you testifying simply from memory?

A. I am testifying from memory.

Q. On what do you base your recollection it was January 10, 1952, that particular date, these statements were given to you?

A. As I recall, that is the date I picked them up and the doctor signed them, as stated, on that date.

Q. You were present when they were signed?

A. Yes.

Q. You stated that this was assigned to you in September of 1951?

A. I believe that is correct.

Q. That again is based on your recollection?

A. Yes sir.

Q. Have you refreshed that by any recent examination of any records which will show more exactly?

A. Yes.

Q. How long ago was that? [274]

A. In the past several days.

Q. What type of record did you examine?

A. I have a record of my sheet, sort of a score sheet, reports I submitted.

Q. Did you submit reports on this matter?

A. I submitted monthly reports at the time I

(Testimony of Vernon Heppner.)

was assigned the work on each particular case and the individual examination on that date.

Q. That was from the sheet? A. Yes.

Q. That did not contain any notations as to what you had done about the matter?

A. No, it was merely a daily report of the time spent.

Q. Did you prepare any memoranda setting forth or summarizing the work that you did on this case? A. No, I made——

Mr. Maxwell: I wish to object to this, in the first place, if this agent did prepare report, it would be immaterial; second, it is beyond the scope of direct examination.

The Court: It seems rather relevant. The witness may answer. Objection overruled.

A. I believe I prepared memorandum of some facts, yes.

Q. You use the word “believe”, I am not trying to press you if you do not remember, but I would like to know whether you are definite in that or not. Are there any circumstances, so far as [275] you know, in the memorandum prepared by you, setting forth the results or summarization of your discussions with the doctor or Mrs. Kelley, or summarizing any other phase of work you did on this matter while assigned?

A. Well, they are not in my possession.

Q. I understand that.

A. I made notes when I was working on the

(Testimony of Vernon Heppner.)

case, which were left in the files when I left, but I have no notations of this.

Q. Were these work sheets, or work facts, that you prepared, or did you prepare a report to submit to your superior?

A. No, no report, merely memorandum.

Q. And I take it the last knowledge you have of those work notes or memoranda is that you left them in the Internal Revenue Service when you left the Service? A. Yes.

Q. You said that you looked specifically for a patient card relating to Harry Green. Harry Green was an Internal Revenue agent at that time?

A. Yes.

Q. You said that you do not recall whether you had previously talked to Harry Green about this matter or not. Do you recall your testimony on that? A. Yes.

Q. On what do you base your testimony that you looked for this [276] particular card, Mr. Heppner?

A. Well, I do not recall whether I saw the doctor at his office more than one time. I do know that I did discuss the matter with Mr. Green and after knowing Mr. Green was a patient of the doctor's, I just looked for the card.

Q. And you recall that you looked for that particular card?

A. That particular card, yes. I knew he was a patient. I wanted to look for that particular card.

Q. Had Mr. Green told you he was a patient?

(Testimony of Vernon Heppner.)

A. Yes, he did.

Q. Had Mr. Green told you that he had requested that Dr. Kelley's returns be assigned to the Internal Revenue Office for investigation?

A. I do not recall that, sir.

Q. Do you recall the circumstances under which Mr. Green told you he was a patient?

A. I believe Mr. Green knew I had the assignment.

Q. If you know, can you tell us how he knew that?

A. I probably told him.

Q. How many cases did you have assigned to you for investigation at that time, Mr. Heppner?

A. At that particular time I would say it was in excess of one hundred, one hundred fifty possibly, at that particular time.

Q. Referring now to around the latter part of 1951?

A. Yes. [277]

Q. You had an active case load of that many different taxpayers, is that right?

A. That many different returns. I wouldn't say that many different taxpayers. May have had several returns from the same taxpayer.

Q. Do you recall that a few minutes ago in the hallway you mentioned to me at the time you left the service, approximately a year later, I believe, you had 260 case load?

A. Yes.

Q. And your case load increased substantially from 1951 to 1952?

A. Substantially, yes.

Q. Do you recall whether there was any particu-

(Testimony of Vernon Heppner.)

lar reason why you mentioned to Mr. Green that you had Dr. Kelley's returns for investigation?

A. No, I don't recall whether there was any particular reason. At that time we frequently discussed tax matters and I think it was just in the regular course of conversation that that came about.

Q. How long after you first talked to Dr. Kelley was this matter assigned to you for investigation?

A. That I don't recall, sir.

Q. Bearing in mind that the net worth statement, Exhibit 121, has typewritten date January 7th, and you testified it was signed in your presence on January 10, 1952, can you tell us approximately [278] how long before that you first contacted Dr. Kelley?

A. Well, as I testified earlier, I believe I contacted him the first trip, September, 1951.

Q. Was that almost immediately after the matter was assigned to you?

A. I can't recall that, sir, I don't know.

Q. Mr. Heppner, in the latter part of each year, while you were working for the Internal Revenue Service, and including the latter part of the year 1951, is it not true that you were concentrating your attention on pending charges on which you were working, on which the statute of limitations would be expiring the following March 15th?

Mr. Maxwell: Objected to as wholly immaterial.

The Court: The objection is good.

Q. Mr. Heppner, was it customary and usual for you, at that time, when a matter was first assigned

(Testimony of Vernon Heppner.)

to you for investigation, to start work on that particular case almost immediately?

Mr. Maxwell: I will object to that as immaterial. The question is what did he do in this particular case.

Mr. Avakian: I think, your Honor, it goes to something more fundamental.

The Court: Restate the question.

Q. Mr. Heppner, at the time that you were assigned the Kelley matter for investigation, was it customary and usual for you, with the case load that you had at that time, to commence work [279] almost immediately on a matter that had just been assigned to you?

A. Well, I think that has been up to the discretion of the agent who started the examination. I don't recall any other circumstances that made it otherwise.

Q. Isn't it a fact that in comparison with what you were doing generally on cases of that kind, you started this investigation much more quickly after it was assigned to you than you were doing generally?

Mr. Maxwell: Objected to as argumentative and immaterial.

The Court: The witness may answer.

A. I do not believe so.

Q. Does all this questioning and discussion refresh your recollection at all, Mr. Heppner, as to whether Mr. Green was interested in having Dr. Kelley's returns examined?

(Testimony of Vernon Heppner.)

A. No, I don't believe that had anything to do with it at all. I got my assignment from the San Francisco office. It was assigned down there and as far as I was concerned, it was a routine assignment and I was to take the case and do as I saw fit.

Q. Did Mr. Green tell you that he had requested that Dr. Kelley's returns be assigned to the Internal Revenue office for investigation?

A. No, I don't think he did. [280]

Q. He didn't tell you? A. I don't think so.

Q. After you obtained the net worth statements, Exhibit 121, would you tell us what you did on this case after that?

A. Some time later Dr. Kelley was called into the office, about four o'clock, and Mr. Green was with me at that time.

Q. And do you remember when that was?

A. Oh, I think it was January or February, 1952.

Q. In other words, within a month or so after the statements were taken?

A. Within a month or so.

Q. Now at that time you and Mr. Green and Dr. Kelley were present? A. Yes.

Q. Was anybody else present? A. No.

Q. Was Mr. Green assigned to the case at that time? A. No, he wasn't.

Q. Was any record made of that discussion?

A. I think we made notes, yes.

Q. There was no stenographic transcription of it? A. I do not believe there was, no.

(Testimony of Vernon Heppner.)

Q. Who made the notes, you or Mr. Green?

A. We both made our own notes.

Q. What happened to those notes? [281]

A. They were turned in to the Service.

Q. Do you recall the substance of that conversation?

Mr. Maxwell: Objected to as way beyond the scope of direct examination.

Mr. Brown: I think, your Honor, the question is how far he can go. If he wants to call Mr. Heppner as his own witness, we have no objection, but this is way beyond the scope of direct examination. If we could see some particular purpose, we wouldn't object.

The Court: Objection is overruled.

Q. Do you recall what was discussed at that conference in January or February, 1952, when you and Mr. Green talked to Dr. Kelley?

A. Well, I think we had a general discussion about the doctor, when he started practice, when he came to Nevada.

Q. Is that the best you can recall of that conversation at that time?

A. No, I believe probably that we discussed matters concerning the financial statement, possibly, but I recall we started asking questions, general questions about the doctor, how long he had been practicing and where he practiced and things of that sort.

Q. And can you, without referring to your notes, recall the answers that he gave you?

(Testimony of Vernon Heppner.)

A. Well, there were a lot of questions and a lot of answers. [282] If you ask me a question, probably I can recall the answer I may have gotten, but to give a memorandum of that discussion, I couldn't.

Q. I understand that and appreciate that, Mr. Heppner. Then after that conference, what else did you do on this case?

A. I just don't recall whether I did any more on that or not.

Q. When was it that you left the Internal Revenue Service? A. In December of 1952.

Q. So that from January or February, 1951 until December of 1952, you don't recall at this time any activity on your part in this investigation, is that right? A. No, I do not.

Q. Did you take any of Dr. Kelley's records from his office? A. No, I never.

Q. Whatever you examined, you examined at his office?

A. At his office and home, but I never took any records from him.

Q. You were also at his home? A. Yes.

Q. Do you remember approximately when that was?

A. I believe it was December of 1951 and January, 1952.

Q. Was that on more than one occasion?

A. Yes.

Q. Do you recall the people present at that time?

A. I think Dr. Kelley was there and the children and Mrs. Kelley.

(Testimony of Vernon Heppner.)

Q. In all these discussions you had with doctor and Mrs. Kelley, [283] did you ever ask them for anything which they declined to do?

A. No, I don't think so.

Q. And you testified that at the time you looked for Harry Green's patient card at the office, you did not ask Dr. Kelley specifically for that patient card on Harry Green?

Mr. Maxwell: I do not remember that to be the witness' testimony.

The Court: I do not think so.

Mr. Avakian: I believe I asked him in my cross-examination if he asked Dr. Kelley for the Green patient card.

Mr. Maxwell: I still don't recall it.

Mr. Avakian: I will repeat it then.

Q. So we can clarify it, did you at any time ask Dr. Kelley if he had the patient card of Harry Green? A. I do not recall that I did.

Q. Since you were looking for that particular card, can you explain why you didn't ask him if he had that particular card?

A. No, I don't know why I didn't. I thought all the cards were there and I just thought I would take a look for it myself.

Q. Was it not customary for you, Mr. Heppner, in conducting your examination of taxpayers, if you were looking for some particular thing you couldn't find, to ask the taxpayer if he had it?

Mr. Maxwell: Objected to as argumentative.

The Court: He may answer. [284]

(Testimony of Vernon Heppner.)

A. Well, if I believed the cards were all there, I could look for them myself. That is why I did it.

Q. Perhaps you didn't understand my question. Let me repeat it. In conducting your examinations generally of the returns of taxpayers, was it not your custom, when you were unable to find some particular thing you were looking for, to ask the taxpayer if he could help you find it?

A. Generally I believe that is true.

Q. But you didn't follow that in this case, however, did you? A. No.

Mr. Avakian: Your Honor, in view of the witness' testimony that he can't at this time remember the details of the discussions with Dr. Kelley, and his testimony he did make notes of those matters, I would like to make a demand on the government for all records of memoranda made by Mr. Heppner, or any one associated with him in the course of this investigation.

Mr. Maxwell: Your Honor, counsel has called for production of the entire file. It contains confidential matters, as the Court is aware. Secondly, counsel went way beyond the scope of direct examination in asking this witness with respect to that conversation. If he had called him as his own witness, there might be some excuse; he would be entitled to see such memorandum. I think in any event the witness' testimony is the best evidence.

Mr. Avakian: If I may be heard, your Honor. First, I [285] am not asking for the entire file. I am asking only for memorandum made by Mr. Heppner

(Testimony of Vernon Heppner.)

and any one else who was associated with him while he was making this investigation. Second, this whole matter was opened up by the introduction of the financial statements on direct examination and I think your Honor is aware of the rule in the Holland case. In a net worth case the government has the obligation, and it has the burden of proof, to make a reasonable investigation of all leads furnished by the taxpayer, and I think under the rule of that case, the introduction of net worth statement obtained from the doctor makes it obligatory that the government come forward with anything sought in connection with it at this time.

Mr. Maxwell: If this was an ordinary net worth case, confined to net worth proof, I would agree with counsel, the government is required to show it followed up all leads. However, the government has to prove specific unreported income from approximately 200 patients and there is no requirement that the starting point or origin be investigated in connection with net worth proof. Here we have only to show specific unreported income for each one of these years.

Mr. Avakian: Your Honor, may I call the Court's attention to one of the items on the net worth statement as of 1946?

The Court: The Court will take the question under advisement and rule.

Mr. Avakian: I would like to correct, for the record, [286] the grossly erroneous statement that there has been proof of unreported income from

(Testimony of Vernon Heppner.)

200 patients. The testimony has related to less than 100 patients and as of now there has been no proof as to which portion relates to unreported income and which not, and I believe, on the contrary, when this is developed, it will appear that as to a large number of patients exactly the amounts they testified was reported, and I do not think that this statement of Mr. Maxwell's, made in the excess of enthusiasm perhaps, should register with the jury without that observance.

Mr. Maxwell: My statement was that we have shown, and will show——

The Court: Ladies and gentlemen, you will see the wisdom of instruction the Court will give you, comments and discussions of counsel will not be considered by you as any part of the evidence in this case. You are to disregard the comments of counsel.

Q. Mr. Heppner, will you relate to us, as best you can remember it now, any other subjects that you discussed with Dr. Kelley during the course of your investigation?

Mr. Maxwell: Objected to as beyond the scope of direct examination.

The Court: Objection overruled.

A. It is rather a difficult question to answer. We discussed many items and I presume I talked about items on the return which [287] I felt warranted discussion.

Q. I was not asking you for your assumptions or presumptions, simply what you remember now, if

(Testimony of Vernon Heppner.)

anything, and if you do not remember, I can understand that.

Mr. Maxwell: I do not think the witness finished.

Mr. Avakian: He was talking in terms of assumption, which I assume was related to general practice. That was not the question.

Q. The question is related to Dr. Kelley in this case, toward items, in other words, that you may remember now as having discussed.

A. I do not recall item by item.

Q. This likewise, I take it, would be reflected in your work notes that you left with the government when you left the Internal Revenue Service?

A. That is right.

Q. And those topics discussed would, I take it, be reflected in the work notes which you left with the Internal Revenue Service at the time you left the Service.

A. If I made notes of it, I am sure they would, yes.

Mr. Avakian: Except for my request for this memorandum or reports and whatever may develop, that completes the cross-examination of this witness. Perhaps he can wait until the noon recess.

The Court: Well, the Court desires to closely examine [288] Exhibit 121 during the recess, before the Court rules on that.

Mr. Maxwell: Your Honor, we have no re-direct examination of this witness. Does Mr. Avakian wish to keep this witness here? Is that my understanding?

(Testimony of Vernon Heppner.)

The Court: Well, the Court will ask the witness to stay.

Mr. Maxwell: So far as the government is concerned, he may be excused. Any objection to the witness remaining in the room, or do you want him to remain under the rule?

Mr. Avakian: I think he had better remain under the rule.

(Witness temporarily excused.)

HARRY GREEN

having been previously sworn, resumes the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Green, last night, if you recall, you were about to embark into conversation which you had had with Dr. Wayne P. Kelley in company with former Internal Revenue agent Vernon Heppner, who just left the stand?

A. Yes.

Q. And what was the date of that interview again? A. February 29, 1952.

Q. And who was present?

A. Dr. Kelley, Mr. Heppner and myself. [289]

Q. Were you assigned the case at that time?

A. No, sir, I was not.

Q. How did it happen that you were in on this conference?

A. Mr. Heppner asked me to sit in and try to take notes in connection with the items.

Q. Did you do that? A. I did.

(Testimony of Harry Green.)

Q. Now, Mr. Green, I have handed you Exhibit 121 in evidence, and you may refer to that exhibit during the following questions. Let me ask you if you recall the conversations which you and Mr. Heppner had with Dr. Kelley on February 29, 1952? A. I do.

Q. Can you state the substance of that conversation? A. I can.

Q. Please do so.

A. As mentioned yesterday, the conference was held in the Internal Revenue office with address in Reno, February 29, 1952, and questions that were asked the doctor pertained primarily to financial matters and in essence answers that we got from the doctor were about like this—the doctor was questioned regarding this cash on hand figure.

Q. How much is that?

A. As of January 1, 1946 it shows cash on hand, not in bank, \$119,000.

Q. Is that approximate or exact? [290]

A. The word used here is approximate.

Q. Continue.

A. The question went first of all as to the matter as to how this cash was acquired. The doctor stated that he had acquired the money over a period of the early thirties, stating first of all that as of the time that he got out of grammar school, he had five thousand dollars in cash. He stated further that around 1928 he had fifty thousand dollars in cash. In regard to a further question, regarding the year 1933, he stated he had 75 thousand dollars in cash. He

(Testimony of Harry Green.)

further stated that during the years 1928 to 1931 he had earned approximately 35 thousand dollars during the summer months, by hauling produce to markets, doing tutoring work, and working on the farm. When asked whether a tax return had been filed for these years, he stated that he had not. These years are 1948 and 1951. He stated the first year he filed a tax return was 1933. He further stated, in regard to this 119 thousand dollars in cash, that he had obtained that figure by two methods. First of all, when he prepared the December 31, 1950 net worth statement for Mr. Heppner, he had listed all the assets he had at that time and then had made a computation as of 1946 regarding the cash, using the income that had been reported between the years 1946 and 1950 inclusive, and figured out that he had that much cash on hand. When questioned further on that point, he stated that he thought that the figure was about right because he had 110 thousand dollars on [291] his mother's farm in Hubbardville, New York in 1946.

Q. I do not understand that computing for 1950 net worth statement. I wonder if you can explain that?

A. Briefly, he put down the assets he had at the end of 1950. Then he knew what other assets, besides the cash, that he had in 1946. To that he added the income reported on the tax returns between 1946 and 1950 and any difference which would show an unreported income figure was shown as cash on hand.

(Testimony of Harry Green.)

Q. In other words, the increase he couldn't account for during that four-year period of time, he made up by increasing his cash on hand at the beginning of 1946?

A. Yes, the doctor's word was that he backed up. He further stated, in regard to this currency he had on hand in 1946, which he stated he had in the early thirties, which would be 75 thousand dollars on hand in 1933, that no one knew about the currency except possibly his present wife, to whom he believed he had mentioned the matter to in 1946. He mentioned that his father was dead, he might have known about it, but he didn't think he had. He mentioned he didn't recall whether his mother knew or not. At the time of the interview, the mother was incompetent and could not verify one way or the other. That was the doctor's statement. As regarding questions of how he brought this money out from the farm, he stated he had brought it out in two trips, one being in 1947, when he brought it in a suitcase by plane and train from Hubbardsville, New York. He stated that the amount [292] at that time that he brought out was approximately 50 or 60 thousand dollars in 50 and 100 dollar bills. The second part of this money was brought out the next year, 1948. He stated that this was brought out in his own private plane, also in 50 and 100 dollar bills, and that the amount at that time was about 50 or 60 thousand dollars, the two totals making up roughly 115 thousand dollars. The doctor further stated to both Mr. Heppner and myself that he had

(Testimony of Harry Green.)

not given a financial statement to any one, he had never made any gifts to any one of \$500 or more. He had never given his father any money and that as regards the settlement with his first two wives, the first one being Elsbeth, the second Maxine, that he had made little, if any, financial settlement. I think those are the important points I recall.

Mr. Avakian: May I inquire whether the paper before the witness is a memorandum referred to or if he is speaking from memory?

Mr. Maxwell: It is Exhibit 121.

Mr. Avakian: That is the net worth statement?

Mr. Maxwell: I believe so.

Mr. Avakian: The witness has had no memorandum before him?

Mr. Maxwell: He has not.

Q. Now as you recall, this conversation took place February 29, 1952? [293]

A. Yes, it did.

Q. Thereafter, was the case assigned to you, Mr. Green?

A. It was, approximately a year later.

Q. Do you recall the approximate date?

A. It was somewhere the latter part of January, 1953.

Q. Did you start any investigation at that particular period of time?

A. No, sir, I didn't do anything on the case until approximately October, 1953.

Q. You had other investigations, did you, as well as this assignment? A. Yes, I did.

(Testimony of Harry Green.)

Q. Did you have a case load like Mr. Heppner had of 100 to 150 cases?

A. In 1953, no, I don't remember the number of cases at all.

(Jury admonished and morning recess taken at 11:00 a.m.)

11:15 a.m.

Defendant present with counsel. Presence of the jury stipulated.

MR. GREEN

resumed the witness stand on further

Direct Examination

The Court: Counsel, will you please state again for the record the demand, request in connection with the witness Heppner's notes?

Mr. Avakian: Yes, your Honor. The defense would make [294] a demand at this time for the production by the government of the various memoranda, work notes, reports or similar documents which contain his notations, regarding the subject matter of his various discussions with Dr. Kelley, and Dr. Kelley's statements to him. That is a statement of the things we are demanding, your Honor. I do not know whether you want me to go further into the reasons for it.

The Court: No. The Court feels, gentlemen, inasmuch as this witness testified without refreshing his memory, that the Court will not require the government to produce the memoranda at this time. The Court is of the opinion that the defendant may

(Testimony of Harry Green.)

make this witness his own. On examination then the defendant may demand.

Mr. Avakian: Your Honor, so that the basis of my request may be clear in the record, may I restate that one of the grounds for my request is that the statements made by the defendant to the witness, Mr. Heppner, during the course of these conversations, would in my opinion come within the basic rule of the Holland case, regarding the investigation of leads given by the taxpayer, and on that basis it would be proper for us to request a showing of what leads were given.

The Court: Yes, I am familiar, as we all are, with the Holland case, and I am also familiar with the position taken by the government that net worth is [295] merely corroborative in this record. Under such conditions it is not necessary to require the record.

Mr. Brown: That is correct, your Honor. I think that the record should factually show that the Witness Heppner testified from memory and at no time did Mr. Heppner have notes in front of him, under the basic criminal law rule.

The Court: That is the statement in the record.

Mr. Maxwell: I think the record should also show that Mr. Green just finished testifying on that same proposition.

The Court: I have said if counsel for the defense desires to call the witness as his own and in the event of that examination it becomes apparent that the record should be produced, he may make the request.

(Testimony of Harry Green.)

Mr. Avakian: I assume if we do it, it is part of our case in chief?

The Court: Yes, that is right.

Mr. Avakian: I would like your Honor—I don't understand, from Mr. Maxwell's statement that the net worth approach had some sort of supposedly influence, because in his opening statement he said not that the net worth was going to be used corroborative, but rather that was going to be one of the two methods, and as I understand, they were relying on the net worth method and I think it is proper to know whether that is correct, [296] or whether their position is that the net worth if not the primary method of proof, but simply is corroborative.

Mr. Brown: We feel, your Honor, when our case is finished, if Mr. Avakian wishes to make motions along these lines, that would be the proper time, and when we are through, if we haven't accomplished what we said we were going to accomplish, but not now.

The Court: Well, counsel may make the point. I think perhaps the proper time to do that is to make the motion at the conclusion of the witnesses.

Mr. Maxwell: What about the witness Heppner?

Mr. Avakian: May he be excused, your Honor, with the understanding we will get in touch with him if we desire to call him.

(Witness excused.)

Q. Mr. Green, I believe you had stated that you were assigned the case, would you state that date again, approximately?

(Testimony of Harry Green.)

A. Some time in January in 1953.

Q. And you took no further action in the case until October, 1953, is that correct?

A. That is correct, except possibly getting an extension of the time.

Q. Did you contact the doctor, then, in October, 1953? A. I did.

Q. And where did you contact him? [297]

A. I called him from our office and made an appointment to see him at his office.

Q. What occurred at that time?

A. At that time we discussed the matter of records.

Q. Before you get into discussion of this, who was present when you visited the doctor?

A. Just the doctor and myself.

Q. Do you recall the date?

A. I believe it was October 5, 1953.

Q. What was said at that time?

A. The doctor and I had a general discussion regarding the records that I would need in connection with the audit of the returns and the location of where the records were at that particular time. The doctor stated some of the records were in the office, the patient cards; the balance of the records he thought were at his home, but he would check on that.

Q. Then what occurred?

A. Well, the conversation—it was either on that day or the following day or the day after, that I actually picked up the records and I told the doctor

(Testimony of Harry Green.)

it was within his rights, legal rights, to refuse to let me take the records out of his office, but because of the shortage of space in which to perform the audit, I preferred to do that in our office, and he said that was perfectly agreeable.

Q. Now can you state then at that time what records did you [298] take and where did you take them from?

A. On this particular day no records were taken, that is, October 5th. The next day it is my recollection, October 6th, I picked up a number of patient cards from the doctor's office just he and I being present, and then the following day, after the doctor had so notified me, I went to their home on Bret Harte Avenue and picked the remainder of the records up from Mrs. Kelley. They consisted of check register, cancelled checks, bank statements, receipt books, various items pertaining to investment, for which a receipt was given.

Q. Do you have that receipt?

A. I have a copy.

Q. Where is the original?

A. The original was given to Mrs. Kelley at the time.

Mr. Maxwell: I will offer the receipt in evidence as plaintiff's next in order.

Mr. Lohse: Your Honor, we have no objection to the admission in evidence.

The Court: The offer will be received and marked government's Exhibit 122.

Q. Now, will you refer to Exhibit 122 and tell

(Testimony of Harry Green.)

the jury and the Court what records you took from Dr. Kelley's home?

A. These are the records I gave receipt for.

Q. Where did you secure those?

A. At the doctor's home. [299]

Q. Did you get any patient cards from Mrs. Kelley? A. No, I did not.

Q. At the doctor's home?

A. No. Receipt for bank deposit on the First National Bank of Nevada, First & Virginia Branch, Reno, for the years 1948 to 1952 inclusive; a check registry covering a period from the middle of July, 1942 to 1952, inclusive; a bank statement and cancelled checks on the same bank, First National Bank, for the period December of 1947 to December of 1952, inclusive; receipt books for the period September 26, 1951 to January 27, 1953.

Q. When you say receipt books, what do you mean? Can you make it more specific?

A. Well, the item here says receipt books, but actually it was a book the doctor used to give receipts for cash payments by various patients, and also some checks.

Q. Do these books contain original receipts or stubs or duplicate receipts, or what?

Q. These were duplicate receipts. Paid invoices for the years 1948 through 1952, inclusive; copies of Dr. and Mrs. Kelley's tax returns for the years 1948 to 1952, inclusive; the physician's account record book for 1952; a notebook covering equipment purchased and medical, physician's expenses

(Testimony of Harry Green.)

for the years 1946 through 1951; an individual dividend record sheet on stocks owned during the years 1948 to 1952, inclusive. It bears my signature.

Q. Now did you have a conversation with Mrs. Kelley at that [300] time with respect to the reason that you wanted these records?

A. You mean the reason why I wanted to take them out of the place?

Q. Yes.

A. To the best of my knowledge, I gave her the same reason I did the doctor, no room to work. Mrs. Kelley had two or three small children at the time, there was no place to work. I told her, to the best of my recollection, I preferred to perform the work at the office. She said that was very agreeable.

Q. She helped you to get the records?

A. She did, and I gave her a receipt.

Q. Did she mention she had talked to Dr. Kelley with respect to your taking the records?

A. Yes, she said the doctor said to take them.

Q. Now, you say that you picked up some patient cards from Dr. Kelley about October 5th or 6th of 1953?

A. It was October 6th.

Q. And did you, from time to time, secure other patient cards from the doctor's office?

A. I think I went back to the doctor's office one other time to obtain additional patient cards.

Q. Did you return the patient cards in your possession to the doctor after each visit?

A. I did.

Q. Now, why didn't you give a receipt for those

(Testimony of Harry Green.)

patient cards? [301]

A. For the simple reason that there were just too many of them to detail on the receipt. There were several bunches of cards, larger bunches than you see there.

Q. At the counsel table?

A. At the counsel table and to itemize each one would be a tremendous job. I explained that to the doctor, the reason for not giving a receipt.

Q. Was he agreeable to that?

A. Yes, he was.

Q. Mr. Green, did you make a search of all of the files of the Internal Revenue with respect to any documents that you might have had, or which the Internal Revenue Service might have had, which might belong to Dr. Kelley? A. I have.

Q. Was that a thorough search?

A. Very thorough.

Q. Did you find any such documents?

A. I did.

Q. What documents were those?

A. I have them in my possession right now, three patient cards of the doctor's.

Q. Might I have them? Can you tell me, Mr. Green, where these additional cards were located?

A. I couldn't say the exact folder, but they were in one of our work paper files, which had been put aside for the time being. [302] Those were each filed individually.

Mr. Maxwell: I think counsel will stipulate that these patient cards are the ones handed to them

(Testimony of Harry Green.)

in chambers and they were willing to accept them at that time. I believe that was Thursday, March 29th.

Mr. Avakian: Your Honor, I state this, that Mr. Brown last Thursday offered certain cards to me in your chambers and I declined to take them except in the presence of the jury, in view of the accusation made that Dr. Kelley had lost or destroyed records. I did not examine the cards then. I will take counsel's word that these are the same ones.

Mr. Brown: You will also stipulate the reason you did not take them, you wanted to take them in front of the jury?

Mr. Avakian: I just stated that, in view of statements you had made.

Mr. Brown: Check them over.

Mr. Avakian: May the record show counsel has handed me the following cards: Florence Case, Katherine Ramsdell, and Virginia Berg.

Mr. Maxwell: Does counsel care to put in the record those cards, sir?

Mr. Avakian: Your Honor, the problem there is that they contain confidential information as between physician and patient. I do not like to have them marked for identification because then they are available to anyone who wants to look at [303] them.

Mr. Brown: We will withdraw the offer. That is correct, that is privileged information.

Q. Now, Mr. Green, did you find any other

(Testimony of Harry Green.)

records or documents, or anything else, belonging to Dr. Kelley in the Internal Revenue file?

A. No, sir, I did not.

Q. Now, did you ever return the records summarized in that receipt, government's Exhibit 122, which you still have?

A. Yes, I did return them.

Q. And did you receive a receipt for those records? A. I did.

Q. Do you have that with you?

A. Yes, I do.

Mr. Maxwell: May the record show that the witness has handed me a piece of paper. I will offer this receipt in evidence as government's exhibit next in order.

Mr. Lohse: Your Honor, we have no objection to the admission of the receipt in evidence.

The Court: The offer will be received in evidence as government's Exhibit No. 123.

Q. Now, Mr. Green, I will hand you government's Exhibit 123 and I will ask you if you had a discussion with Dr. Kelley at the time that receipt was given to you?

A. I don't recall that we had any conversation at that time. [304]

Q. What is the date?

A. The date is December 17, 1953, is the date on the letterhead receipt, and that actually was the date the documents were returned.

Q. Is there the signature of Dr. Wayne P. Kelley on that? A. Yes, sir, there is.

Q. Was that signed in your presence?

(Testimony of Harry Green.)

A. In the presence of myself and Special Agent Black.

Q. Did you go over the items on that receipt and records you were returning?

A. Yes, sir, in great detail.

Q. Can you tell us what occurred?

A. The doctor checked over each item that we presented to him on this receipt. He checked over very carefully to make sure it was just exactly what was there.

Q. I notice there are some check marks on that piece of paper in ink. Are those the doctor's check marks?

A. To the best of my knowledge, those are his check marks, also his marks on the duplicate receipt and original.

Q. Did he go over them at the same time?

A. Yes, because that was the basis of checking, to make sure he had everything back.

Q. He went over the duplicate receipt and the original?

A. Well, he checked the duplicate receipt against the documents we were returning, and then he checked off. [305]

Q. He matched your duplicate receipt, is that correct, with the document?

A. I am not quite sure right now whether he matched a document with my duplicate receipt and then found an item and then found an item on this one for which he was receipting, or whether he used this receipt he was signing.

Q. Did he have with him the original of the re-

(Testimony of Harry Green.)

ceipt which you turned over to Mrs. Kelley?

A. I don't recall seeing it.

Q. You never saw that? A. No, sir.

Q. So they used your duplicate of that receipt and the original receipt which was in typewritten form, is that correct?

A. To the best of my knowledge, yes.

Q. The doctor didn't tell you he had lost that, did he? A. The original receipt?

Q. Yes.

A. If there was any conversation on it, I don't recall now. I know when we went over there with the records, we took this typed receipt with us.

Q. May the record show I am handing you Exhibits 11, 12, and 13, which are entitled, "Certificate of Assessment Payments," and 13 being from the office of the District Director of Internal Revenue, Syracuse, New York, and No. 11 and 12 being from the office of District Director at Reno. [306]

A. That is correct.

Q. Now, Mr. Green, did you attempt to determine the amount of cash on hand that Dr. Kelley could have had on these earlier returns on January 1, 1949? A. Yes, I did.

Q. What did you do in that respect?

A. First of all, I used the records of the Internal Revenue office, both Syracuse, New York and Reno, Nevada, to determine what taxes had been paid.

Q. Let us find out what you used in making your computations.

A. Do you want to go over that year by year?

(Testimony of Harry Green.)

Q. Yes, more or less. For what years did you have the original returns?

A. I had the original returns for the years 1942, 1943, 1946, 1947, and 1948.

Q. I will hand you plaintiff's Exhibits 1, 2, 3, 4, 5 and 6, and ask you if those are the returns to which you refer? A. Yes, these are the returns.

Q. Besides those returns, what else did you use?

A. I used the record of tax payments, income tax payments obtained from Syracuse, New York Internal Revenue office.

Q. That is exhibit what?

A. That is Exhibit 13 in that particular case. Then, as regards the years 1942 through 1945 returns, those were not available. [307]

Q. I believe you have a 1942 return up there.

A. 1942 and 1943 we had the returns; 1944 and 1945 we had no returns, so we used the records of the tax paid per the Reno Internal Revenue office, which is Exhibit 11, and for the later years we had the returns.

Q. Now, did you use anything else in making such determinations?

A. Well, I had to have the reference table, which would show the tax reference in the various years that we didn't have the returns, to determine what the income was, where there was a tax paid or where there was no tax paid.

Q. Then, Mr. Green, what does your computation show? Have you made such a computation?

A. Yes, I have.

(Testimony of Harry Green.)

Q. Is it in typewritten form or handwritten form? A. It is in my handwritten form.

Mr. Maxwell: May I see it? I will ask the two pieces of paper be marked for identification.

The Court: The offer will be marked Exhibit 124(a).

Mr. Maxwell: May it please the Court, I believe examination of this matter will take 15 or 20 minutes. It might be an appropriate time to recess.

Mr. Avakian: Your Honor, before we recess, I wanted to answer inquiry Mr. Maxwell made with reference to these three cards. He asked me if I would stipulate——

Mr. Maxwell: I made no such request, counsel. I asked [308] counsel if he would care to read the cards in the record.

Mr. Avakian: I would like to state examination of the cards show the card of Virginia Berg has various dates and months without a year on it, your Honor.

Mr. Maxwell: You can't determine what year it is, counsel?

Mr. Avakian: Not from examination of the card. As to Katherine Ramsdell, the card has data on it with regard to treatments, but it likewise does not show the date.

Mr. Maxwell: Does it show payment?

Mr. Avakian: It shows \$10, but I can't tell payment or charge from the card. With reference to Mrs. Florence Case, the card shows it is in 1948 and 1949, including a payment of \$270 on January 10,

(Testimony of Harry Green.)

1949 and stapled to the card is a letter from the Bank of America, San Francisco, dated January 7, 1949, reciting that enclosed with the letter is cashier's check for \$270, representing the amount due on account of Florence Case.

Mr. Brown: I think that should be stricken. They are reading from the patient card.

The Court: Gentlemen, I just can't understand all the ceremony of these cards.

Mr. Avakian: There was an inquiry as to whether we would care to recite the dates, and I am giving it.

(Jury admonished and noon recess taken at 12:00 o'clock.) [309]

Afternoon Session—April 3, 1956, 1:30 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MR. GREEN

resumes the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Green, you now have in front of you plaintiff's Exhibit 124(a) for identification. Now I believe you previously—tell us what Exhibit 124(a) is.

A. Briefly, it is merely a computation to show income tax returns that were filed for taxes paid and the computation of income made from the tax, what the doctor could have accumulated in the way of assets during the years 1932 through 1948.

Q. Now, for the year 1932, I believe you have

(Testimony of Harry Green.)

form 899 up there, the certificates of assessments, Exhibits 11, 12, and 13 you also had the income tax returns, didn't you, for the years 1942 to 1948?

A. That is correct.

Mr. Avakian: No, Mr. Green testified he didn't have them for those five years.

Mr. Maxwell: I will accept counsel's correction.

Q. Mr. Green, I will give you all these income tax returns, exhibits 1 through 10. Now for the year 1932, as I recall previous testimony here, the doctor was in medical school at that time, is that correct? Do you recall testimony to that effect?

A. That is my recollection, yes. [310]

Q. For that year, do the records which you have in front of you show whether or not a return was filed?

Mr. Avakian: Just a moment, your Honor, I submit the record speaks for itself. The witness should not interpret it. He didn't prepare it.

The Court: I don't think the question asked for his interpretation, counsel.

Mr. Avakian: I may have misunderstood, but I would like the witness to be cautioned not to interpret what is in the document, because I think there is room for interpretation, what he is being asked about.

Q. Do the records indicate that any return was filed by Dr. Wayne P. Kelley for the year 1932?

Mr. Avakian: I submit that calls for the witness's interpretation as to what the record indicates. The document simply recites on a form

(Testimony of Harry Green.)

which is supposed to set forth information in the Collector's office, the words "No record."

Mr. Maxwell: I think counsel can argue at the end of the case. He is certainly entitled to cross examination and I think he is going to be given opportunity to cross examine this witness and I suppose that the witness will be permitted to answer.

The Court: Objection overruled. The witness may answer.

A. The record discloses for the year 1932 no returns filed. [311]

Q. And what exhibit are you referring to?

A. Referring to Exhibit 13.

Q. And what word was shown on there in respect to 1932 records of the Director of Internal Revenue for the District of Syracuse?

A. No record.

Q. What does that mean, in customary usage, on form 899, Certificate of Assessment?

Mr. Avakian: Objected to as calling for conclusion of the witness on a matter he is not qualified and in respect to a document not issued in this office and no foundation laid as to any matters called for by that question.

Mr. Maxwell: May it please the Court, this witness, I understood his testimony in the record, that he has been an employee of the Internal Revenue Service for over ten years.

Mr. Avakian: Not in Syracuse. He had nothing to do with the preparation.

(Testimony of Harry Green.)

Mr. Maxwell: And he certainly is qualified to testify as to usual useage of the Internal Revenue forms.

The Court: Objection overruled, answer.

Q. What do the word, "No record" mean in connection with form 899, Certificate of Assessment Payment?

A. It means that the Internal Revenue office for the district had searched their files and had found no record of a return being filed for that date.

Q. Now, did you determine what amount could Dr. Wayne P. Kelley [312] have earned during the year 1932 without filing a return? In other words, what was the maximum amount he could have earned without being required by law to file a return for the year 1932? A. \$2900.

Mr. Maxwell: With the Court's permission, I am going to put these amounts on the blackboard.

Q. And would there be any other possible credit in that year that has been brought to your attention, Mr. Green? A. No, sir.

Q. So what is the maximum amount that he could have made for the year 1932 without being required to file a return? A. \$2900.

Q. Now, did you make a similar computation as to the year 1933? A. I did.

Q. What did you do in making your computation?

A. I checked against the Internal Revenue records, as represented by Exhibit 13, and found that there too no return had been filed.

(Testimony of Harry Green.)

Q. And what elements did you take into account in computing the maximum amount that he could have made for that year, without being required to file a return?

A. I took the net income requirement, which in this particular year happened to be the married requirement, plus a man with one child. [313]

Q. How much would that maximum amount be?

A. \$2900.

Q. And you did the same thing for 1934?

A. I did.

Q. Would you explain the same way as you did for 1933?

A. In this particular year, 1934, I referred to Exhibit 13, he returned one for that year and it was a non-taxable return, which means no tax due and payable, on the return.

Q. Then in 1932 the letter "N. R.", no record, and the same thing in 1933 and 1934 was a non-taxable return, is that right?

A. That is correct.

Q. All right, put down "N. T." Now what would be the maximum amount of income that could have been reported on that return to have it still within the non-taxable range?

A. Going back to the amount for two children, \$3300.

Q. That would be two children?

A. That is correct.

Q. Did you do the same thing as to 1935?

(Testimony of Harry Green.)

A. I did. On that year, as in 1934, a non-taxable return was filed.

Q. What would be the maximum amount of income that could have been obtained on that return and still have been non-taxable?

A. The second part of 1934 that figure should be \$2900. It is based on one child.

Q. One child? [314]

A. Yes, the information I was giving, the year 1935, the figure would be \$3300, based on two children.

Q. How about 1936?

A. For the year 1936, referring again to Exhibit 13, the taxpayer did file a return and he paid tax in the amount of \$13.78.

Q. And did you, taking into effect the various exemptions, did you compute the amount of income that would be for \$13.78 would be tax upon?

A. Yes, I did, and the figure I came up with, allowance for two children, was \$3644.50.

Q. Now what about 1937?

A. 1937 was the same situation as in 1935. There was a return filed but it was a non-taxable return. I allowed the doctor the marital exemption and the credit for two children, as in the previous year, and the figure was \$3300.

Q. Now these figures all refer to net income, is that correct?

A. That is correct. During those years there was a net income requirement rather than gross income requirement in filing taxes.

(Testimony of Harry Green.)

Q. How about 1938?

A. 1938 had a non-taxable return. Checking into it, after applicable allowance for being married and having two children, the amount was \$3300.

Q. Now 1939.

A. Exactly the same as 1938, non-taxable return being filed. [315]

Q. 1940?

A. In 1940 a non-taxable return was also filed. In that year there was a gross income requirement, rather than a net income requirement, but in computing this figure, I took into effect the marital exemption and amount for two children and figured \$2800.

Q. Was that gross income?

A. That would be—not knowing what amount of net income the doctor reported, the only thing I could do was to compute the maximum amount of income he could earn without having to pay any tax, and that would be \$2800.

Q. What about the year 1941?

A. For the year 1941 there was a return filed, on which a tax of \$2.08 was paid. A computation was then made of the income tax by taking into effect the deduction of a man being married and having two children, and the net income figure would be \$2320.80.

Q. What about 1942?

A. Exhibit 11, from the Reno Internal Revenue office, shows that a non-taxable return was filed. We also have the original return in evidence.

(Testimony of Harry Green.)

Q. I think it is right in front of you.

A. That's right.

Q. And that would be a non-taxable return, did you say? A. That is correct.

Q. And what is the amount of net income shown by that return? [316]

A. The amount of net income is \$525.39, but to that I added the \$1500 excluded for army service, so the actual figure would be \$2,025.39.

Q. Now for the year 1943?

A. The year 1943 is in evidence here as Exhibit No. 1. That discloses a net income figure of \$167.00, no tax paid. However, in computing the figure that I used here on this computation to allow the doctor the maximum income that could be obtained by the government return and made a computation here which showed a total income of \$12,167.

Q. You say that was a non-taxable return year?

A. That is correct.

Q. Now did that return show that he made that much money?

A. The return shows that he had that much in funds available that year.

Q. Now for the year 1944?

A. The year 1944, the record of the Reno Internal Revenue office disclosed that a tax of \$108 was paid. For that year I had to again reconstruct the net income available to the doctor, based on the tax, by using the applicable tax rate, plus marital exemption and allowing him credit for two children, and the figure then is \$4,124.99.

Q. How about the year 1943? I note that is 12

(Testimony of Harry Green.)

thousand. Do you have any explanation for that?

A. Yes, I do. In that particular year the doctor sold his house [317] in New York, I believe, and he received, according to the tax return, \$9,240. I gave him credit for the full amount of \$9,240——

Q. As having been received?

A. That's right; plus the other items on the return that he had reported.

Q. How much net income did that return show for that year? A. \$167.

Q. All right, 1945?

A. The records disclose that the return for 1945 was filed and tax of \$93.20 was paid. Recalculating the income for that year from the tax that was paid, allowing the doctor marital status, plus two children, it has resulted in a net income figure of \$4,049.99.

Q. All right, 1946?

A. The year 1946 separate returns were filed by the doctor and Mrs. Lois Kelley, his wife. The total tax paid for that year was \$854.

Q. And what would be the total net income available to Dr. Kelley?

A. I used my audit for the year 1945. I also gave the doctor credit for \$1500 military exemption. The total income for 1946 is \$6,089.57.

Q. Now 1947?

A. The original returns, which are in evidence here, show a [318] separate return was filed by husband and wife, Lois and Wayne P. Kelley, and total tax paid of \$1,586.00. Total income reported, \$9,964.66.

(Testimony of Harry Green.)

Q. And 1948?

A. The year 1948 a joint return was filed by Dr. and Lois K. Kelley. Total tax paid was \$1,743; total income was \$12,131.33.

Q. Now you have totals, Mr. Green, for this particular year period 1932 to 1948? A. I do.

Q. All right, what are your totals?

A. Total for that, that you have on the black-board.

Q. That is income amounts, is that correct?

A. That's right, \$80,818.23.

Q. And total amount of tax paid?

A. No, sir, I didn't make a total of that.

Q. Take the figures here and add them up. Just come down here and add them up.

A. I think it would be easier just to do it from my work sheet, if I may.

Q. All right.

A. I have a total figure here of \$4,292.06.

Q. That \$4,292.06 would be required of 80 thousand? A. That is correct.

Q. So in other words, to find what monies were available he had, we subtract 4,292.06 from 80,818.23? [319] A. That is correct.

Q. Because that amount was paid into the government?

A. That is correct. Now there is an additional amount here which should be added to the funds available.

Q. What is that?

A. That is during the doctor's military service there was subsistence and rental allowance that was

(Testimony of Harry Green.)

paid to him as an army officer, which was not taxable under the law. Now I have a figure totalling that.

Q. Now have you excluded from any of these amounts the amount it cost the doctor to live during the years 1932 to 1948?

A. No, sir, I have not charged him with any.

Q. In other words, this is as though he never spent any money for groceries or clothes or anything like that?

A. That is right.

Q. Add that subsistence allowance in to, what was that?

A. The amount is \$5,742.

Q. We did add that to the 80 thousand?

A. That is correct.

Q. And then subtract \$4,292.06?

A. That's correct.

Q. What is the answer you finally come out?

A. The net figure is \$82,268.18.

Q. \$82,268.17?

A. Yes, sir. [320]

Q. Now, Mr. Green, in the course of your investigation, did you run across any information with respect to stock rights and shares held by the doctor during the years 1949 to 1952 in the Southern Natural Gas Company?

A. Yes, I did.

Q. Where did you run across that information, sir?

A. In the doctor's record of stock list sheet turned over to me, with the notation that on February 1, 1951, they had paid \$165, plus \$3 for the rights to acquire this stock.

Q. And do his records still show that he owned

(Testimony of Harry Green.)

that stock at the end of 1952? A. Yes, sir.

Q. Did his income tax of 1951-1952 reflect the sale of that stock?

A. Without looking at it right now, I would say no. I am not positive. I do not recall.

Q. Now, did you, in going over the doctor's records, find information with respect to monies he had spent for equipment during the years 1949 to 1952?

A. The doctor had an equipment book, in which these various items were listed, where he had purchased various items of professional equipment and I made a test check against those figures with the items on the tax returns and found them to be approximately the same.

Q. Now, you have heard some testimony here undoubtedly about an [321] airplane. Mr. Green, did you find on the doctor's records information with respect to the purchase of an airplane?

A. I found information pertaining to one airplane. The information is under airplane he had previously bought.

Q. What did you find?

A. I find that on June 11, 1948, by check No. 2093, which was memo from the doctor's registry, he had spent five thousand dollars for an airplane. There is a notation in his equipment book that he was allowed \$4500 trade-in on another airplane that he previously owned, making a total figure of \$5,500.

Q. Is there a reference on the income tax returns to the total amount for airplanes 1949-1952?

(Testimony of Harry Green.)

A. To the best of my recollection, the airplane is reported on the 1951 returns.

Q. What did he use for figures on the return?

A. You are talking about the year 1949 and 1950?

Q. Yes.

A. In the year 1949 it shows a value of 8 thousand dollars for an airplane, acquired in 1949, according to the returns. Depreciation was claimed on the airplane. For the year 1950 the 8 thousand dollar figure appears again in the depreciation schedule for airplane. In the year 1951 the value of \$9500 appears in the depreciation schedule of the airplane, and the year 1952 the \$9500 again appears on the depreciation schedule.

Q. And is that the same airplane all the way through? [322]

A. Are you referring to the 8 thousand?

Q. All the way through?

A. The 9500 airplane would be the same one all the way through, that is right. The 8 thousand dollar figure, according to the examination of the figures, was erroneous. It should have been 9500.

Q. Wasn't there something in there about sale of an airplane? Just tell me what the returns show.

A. I think there was in one of these years, yes; in the year 1948, the doctor claimed a loss on the sale of an airplane, stated its cost was \$9500 and sale price was \$8,000. We determined what really happened, there was refund given on the old airplane towards a new airplane.

Q. Did you talk to the doctor about that?

(Testimony of Harry Green.)

A. I think so—I am not sure about that. We conducted most of the questioning on that point with Mr. Lyons, the doctor's accountant.

Q. Now, Mr. Green, in going through the doctor's records, did you find information as to the purchase of furniture and making of improvements to his home? A. Yes, sir, I did.

Q. Will you tell us what your investigation of the doctor's records disclosed in that respect?

A. May I refer to my notes?

Q. Yes, certainly. [323]

A. The first entry is the matter of furniture for the home. An examination was made of the doctor's check registry to determine what items were paid by check. In addition, the records of the Home Furniture Company, where the things were purchased in the doctor's name, are now in evidence, were also examined and totalled and I arrived at the various figures in that examination.

Q. Will you please give me what you found with respect then to the furniture?

A. At the end of the year 1948 the amount of furniture owned was \$2,624.29. The figure for the year 1949 is exactly the same. The year 1950 there were a few small purchases that increased this amount of furniture owned to \$2,827.91. At the end of 1951 the figure was \$2,907.74, and the year 1952 shows the same, \$2,097.74. As regards the home improvements, those were obtained by analyzing the doctor's check registry and I have various figures for this here.

(Testimony of Harry Green.)

Q. Well, can you tell us what improvements were made and the amounts at the end of each year, 1949 to 1952?

A. Yes, I can. For the year 1949 I couldn't find any record of any home improvements from the check registry. The year 1950 there was \$703.15 expended for improving his home. That is made up of four items. Do you wish me to read those?

Q. Yes, please.

A. First item was electric sink, \$367.50; sink installation, [324] \$77.72, tile, \$69.97, labor, \$187.96. In 1951 \$310.00 was expended for a basement bathroom and the labor involved, total, \$382.72, making a total of expenditure that year of \$692.72. That, plus the improvements in 1950, made a total amount at the end of 1951 of \$1,395.87. In the year 1952 nothing could be found to show any further improvements. I have the figure of \$1,395.87.

Q. Now, Mr. Green, in addition to these items that you have just testified to, did you also make an attempt to determine what life insurance premiums had been paid by the doctor during the years in question?

A. I did, based on the check registry. Excluded from any figures I have are certain other personal items.

Q. I wonder if you tell us what conclusion you arrived at in connection with these figures.

A. I am sorry?

Q. Could you tell us how much he paid in the way of insurance premiums and whatever items you

(Testimony of Harry Green.)

have added in there, if you haven't those separated?

A. I don't really have them separated. I have that placed in one category, which is financial personal things and other personal expenses, exclusive of food and clothing and rent.

Q. How much did you find to have been spent under this category?

A. For the year 1949, \$787.01; in the year 1950, \$630.93 was [325] expended; in the year 1951, \$845.26 was expended; in the year 1952 total was \$936.41. A portion of that was child support and maintenance.

Q. During what years?

A. During the years 1950-52.

Q. Do you have any information as to the exact amount of those child support payments during the years 1950-1952?

A. I believe I do. During the year 1950 there was \$350 paid out of the check registry and additional \$3000 back child support settlement. That was not paid by check. In the year 1951 and 1952——

Q. Just a moment, Mr. Green, before you go to 1951 and 1952.

Mr. Maxwell: I would like to offer in evidence, as government's next in order, document entitled "Satisfaction of Judgment" in the case of Elsbeth Frances Kelley (Moore), plaintiff, vs. Wayne Plumbley Kelley, defendant, filed May 16, 1950, certified by the clerk of the court.

(Testimony of Harry Green.)

Mr. Lohse: Your Honor, we have no objection to the admission.

The Court: The offer will be received as government's Exhibit 125.

Mr. Maxwell: I would like to read this document to the jury at this time, if the Court please.

The Court: You may.

Mr. Maxwell: (Reads): [326]

"No. 126,192. Dept. 1. James D. Finch, Reno, Nevada, Attorney for Plaintiff.

"In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

"Elsbeth Frances Kelley (Moore) Plaintiff, vs. Wayne Plumbley Kelley, Defendant.

"Filed: May 16, 1:13 p.m., '50. E. H. Beemer, Clerk. By H. K. Brown, Deputy.

"Satisfaction of Judgment.

"For and in consideration of the sum of Three Thousand Dollars, to me in hand paid by Wayne Plumbley Kelley, the Defendant named in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, in the above-entitled action for the sum of Three Thousand Dollars in favor of the plaintiff herein and against the said defendant herein, and I hereby authorize the Clerk of said Court to enter satisfaction of record of said judgment in the amount of said Three Thousand Dollars, the remaining por-

(Testimony of Harry Green.)

tion of said judgment as to the future support of the two minor children therein not being affected by said satisfaction for the sum of Three Thousand Dollars. [327]

“In Witness Whereof, I have hereunto set my hand this 16th day of May, A.D., 1950.

/s/ JAMES D. FINCH,
Attorney for Plaintiff.”

With the Court's permission, I will not read the certification.

Mr. Avakian: We would appreciate that.

Mr. Maxwell: You want it read?

Mr. Avakian: We would appreciate it if you skip it.

Q. Now will you go back to your testimony as to child support during the year 1950, so that we get a picture of 1950, 1951, 1952.

A. In addition to the three thousand dollars payment by the doctor, there was, during the year 1950, \$350 paid by Dr. Kelley to Elsbeth Kelley.

Q. By check?

A. By check. In the years 1951 and 1952, also by check, was the amount of \$600 each year. This also was paid to Elsbeth Kelley.

Q. Which ones of those amounts are included in any items of life insurance premiums and other personal items, except food and clothing?

A. \$350 in the year 1950; this is not food and clothing.

Q. Inclusive is what I thought I said.

(Testimony of Harry Green.)

A. \$350 the year 1950; \$600 in the year 1951; \$600 in the year [328] 1952. May I just check my figures again, just a moment?

Q. Certainly.

A. I am sorry. The child support payments are not in those amounts. They are for living expenses.

Q. Now, Mr. Green, did you find any information with respect to food and clothing and other personal living expenses of Dr. Kelley?

A. The analysis of the check register, the only record we had to go by, showed that during the year 1952 we find the items expended by check for food and clothing; 1949, 1950, 1951——

Q. How much did you find for 1952?

A. \$299.01.

Q. Now did you ever, at any time, ask Dr. Kelley for such information? A. I did not.

Q. Mr. Green, did you find any information in the doctor's records with respect to some Marchan Valve stock?

A. Yes, that was in the doctor's investment record.

Q. And what did you find as to purchases of that stock during the years 1949 to 1952?

A. I do not have the figures how the acquisition was or the cost. It was still on hand at the end of 1952. My recollection is it was 200 acquired in 1948 or 1949. I do not have the information here.

Q. I believe you said, Mr. Green, that you had the check register. [329] Did you also have the cancelled checks?

(Testimony of Harry Green.)

A. I believe the receipt shows that we did have the cancelled checks.

Q. While you had the records, did you attempt to determine the outstanding checks at the end of each year, 1948 to 1952?

A. No sir, I do not believe I did.

Q. Did you subsequently receive information with respect to the outstanding checks from one of Dr. Kelley's representatives?

A. Yes, I did.

Q. Who was that?

A. Mr. Lyon furnished Mr. Black and myself with certain reconciliation bank accounts, showing outstanding checks.

Q. And can you state that figures were given to you?

A. I believe I have them here. Yes, I do have them, from Mr. Lyon.

Q. What information did he give you with respect to outstanding check for the years 1948 to 1952? Will you give us the figures that he gave to you?

A. This relates to the checking account at the First National Bank of Nevada, First & Virginia Branch, in Reno. This shows that the balance at the end of 1948 was \$155.09.

Q. What do you mean, balance? That is adjusted balance in the bank account?

A. That is the adjusted balance, after deducting the outstanding checks. [330]

(Testimony of Harry Green.)

Q. What bank would that be?

A. First National Bank of Nevada.

Q. Showing you Exhibit 25, which has been placed in evidence, ledger sheets of the account of Wayne P. Kelley, M.D., or Lois Kays Kelley, First & Virginia Branch, First National Bank of Nevada, that is the account to which you refer?

A. That is correct.

Q. What is the balance shown on the bank record at the end of the year 1948? A. \$262.25.

Q. Now you say the adjusted balance for that account on that date is \$155.09?

A. That is right.

Q. Why is that?

A. There were three outstanding checks that had not cleared the bank at that date, totalling \$107.16.

Q. Explain that to me a little bit further. You mean that Dr. Kelley had previously written these checks, before the end of the year 1948?

A. That is correct.

Q. And they had not been deposited or tendered, given to the bank for collection yet?

A. That is correct.

Q. At the end of the year 1948?

A. At the end of the year 1948. [331]

Q. They came in later on?

A. They came in apparently after the first of the year.

Q. So you have knocked the balance by the amount of those checks that were outstanding, is that right? A. Yes.

(Testimony of Harry Green.)

Q. And for the year 1949 account you did the same thing? A. Yes.

Q. Which made the amount of corrected balance at the end of the year 1949 and amount of outstanding checks—

A. Shall I refer to the ledger card or Mr. Lyon's statement?

Q. Both of them.

A. These cards are a little mixed up.

Q. Well, why don't you use Mr. Lyon's statement? I am sure that is right.

A. At the end of the year 1949 the bank balance was \$709.02. There were outstanding checks as at the end of 1949 of \$379.07, leaving a reconciled bank balance of \$329.95.

Q. At the end of the year 1950?

A. At the end of the year 1950 the bank ledger card shows a balance of \$989.05. Subtracted from that are outstanding checks totalling \$217.30, making a balance at the end of 1950, corrected, of \$771.75.

Q. The subtraction does not make it quite right, Mr. Green. Will you go over those figures again?

A. \$989.17. [332]

Q. I thought you said \$207.30—it is \$217.30?

A. Right.

Q. Will you give us the adjusted balance again at the end of the year 1950? A. \$771.75.

Q. And 1951?

A. The bank balance shows a figure of \$10,170.67. There were outstanding checks totalling \$69

(Testimony of Harry Green.)

that year, leaving a reconciled balance of \$10,101.67.

Q. And 1952?

A. The bank showed balance of \$1244.17; outstanding checks totalled \$139.16, leaving a reconciled balance of \$1105.01.

Q. Mr. Green, I forgot to ask you, did you, while you were examining the patient cards of Dr. Kelley, did you ever happen to run across your patient card?

A. No sir, I did not.

Q. Did you look for it? A. Yes sir.

Q. Now, Mr. Green, I wonder if you made an investigation to determine, at least in part, items of cash or currency which were available to the defendant for expenditures during the years 1949 to 1952? A. Yes sir, I did.

Q. What did you find in that respect? What cash did you find had been received and was available during the year 1949? [333]

A. During the year the doctor had available, in unidentified cash receipts, not in bank account, \$2231. In addition he also had available checks that were not cashed, reflected in business receipts.

Q. You mean reported on the return?

A. That is correct, of \$3,794.25. The same year there were two dividends from the Southern Natural Gas Company totalling \$6,000, which was reported on the tax return but could not be found on the bank account.

Q. You mean could not be found on the bank deposits?

(Testimony of Harry Green.)

A. That is right. That was considered additional. During the same year a thousand dollar bond was cashed, No. M393508D, which did not appear on the bank deposits. Therefore, the thousand dollars was given as a source of funds. That is all for the year 1949.

Q. Did you find any items that might reflect any cash available to Dr. Kelley for expenditure during 1950?

A. Nothing at the moment which I recollect.

Mr. Avakian: I am sorry, I didn't get the question.

Mr. Maxwell: What information did he have in the same respect for the year 1950?

A. I am sorry, I said 1949. For 1950 the doctor also had cash available from the following sources: cash that was not deposited in bank account or reflected in tax returns, totalling \$2271. In addition there were checks that were cashed in that [334] year, also reflected on tax return, not in bank deposits, totalling \$3536.00, and in that year, 1950, the doctor cashed a thousand dollar endowment policy, which could not be found in either the bank deposits or assets and considered additional sum in cash.

Q. How did you find out about the thousand dollars, Mr. Green?

A. He hadn't received a thousand dollars. The difference between the first cost and the thousand dollars was reported as income on the tax return.

Q. Are you still in the year 1950?

(Testimony of Harry Green.)

A. Yes. That is all the sources available. There is an expenditure item.

Q. What is that?

A. In the savings account No. 5192, Security Bank of Reno, on February 15, 1950, there is a deposit of \$800 in currency, which would reduce the cash available for that year.

Q. What about the year 1951?

A. In 1951 the doctor had available to him cash on deposit, but reported on tax return, \$12,811.95. There were certain checks that were cashed that year which were reported receipts on the tax return, totalling \$654.50. That is all the source for that year.

Q. 1952?

A. The year 1952 the receipt book of the doctor's disclosed there was \$12,350.50, which was primarily cash received or for [335] checks that were cashed. This figure was not in the bank deposits or in reported receipts on the tax return. Therefore, it is considered a source of cash for the doctor. And in addition there were certain unidentified cash items reflected in the doctor's duplicate bank deposit slips which were in the reported receipts on the return, the net being \$203. That's all.

(Jury admonished and recess taken at 2:50 p.m.)

3:05 P.M.

Defendant present with counsel. Presence of jury stipulated.

MR. GREEN

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): I asked you with reference to Marchan Valve stock. A. Yes sir.

Q. Did you check your records and find out when it was purchased and the amount?

A. The date was August 24, 1929 and the amount was \$200.

Q. Did you find any information on the doctor's records with respect to deductible expenses?

A. Yes sir, I did.

Q. What did you find in that respect for the years involving 1949 to 1952?

A. For the year 1949, I would like to give it broken down in various categories.

Q. Please do. [336]

A. The year 1949 there were \$68.50 contributions. Medical expense was \$84.92. I did not find in the check register the real estate tax paid on the home. For the year 1950, contributions totalled \$237; medical expense, personal medical expense, totalled \$83.39; real estate taxes totalled \$232. For the year 1951, contributions totalled \$407; personal medical expenses totalled \$159.15; real estate taxes and other personal taxes totalled \$326. For the year 1952, contributions totalled \$523; personal medical expenses totalled \$101.45; real estate taxes totalled \$282.25. These were all taken from analysis of the doctor's check register.

Q. Were those amounts included by you in the

(Testimony of Harry Green.)

amounts of insurance premiums and other living expenses, exclusive of food and clothing?

A. No sir, they were not.

Q. Now I wonder if you can tell me in what year these amounts, specified deductions on page 3 of the return, were claimed and what year Dr. Kelley claimed the standard deductions? You have the returns to refer to, do you not?

A. Yes, I do. In the year 1949 the doctor did claim specific deductions. Do you wish me to read what that was?

Q. Yes, please do.

A. In 1949 the doctor claimed \$386 contributions, of which I found \$145 in the check book. Still in the same year I did not find any item for medical expenses, but the amount on the tax [337] return was \$457.65.

Q. Now, Mr. Green, my notes may be wrong, but I thought you told me you found \$68.50 for contributions and \$84.92 for medical expenses, for the year 1949?

A. I beg your pardon, I was wrong there. The year 1949 the contributions I found in the check register was \$68.50, the medical expense was \$84.92.

Q. What was on the return for that year, 1949?

A. \$386 for contributions and \$457.75 for medical deduction.

Q. Was there anything else on page 3 deductions on the return of 1949?

A. No sir, there was not. In 1950 the doctor claimed the thousand dollar standard deduction; in

(Testimony of Harry Green.)

1951 he also claimed the thousand dollar standard deduction, and likewise in 1952.

Mr. Maxwell: You may inquire.

Cross Examination

Q. (By Mr. Avakian): Mr. Green, I believe you testified yesterday afternoon, in explanation of your commencement of this investigation, that in May of 1951 you gave Dr. Kelley three of your personal checks, in amounts of \$5, \$20, and \$10, and that when they came back to you from your bank, you noticed that they had been cashed rather than deposited. Do you recall that testimony?

A. Yes sir.

Q. In explanation of that, before your own checks were presented, you referred to some other checks in the exhibit here [338] and evidence here and referred to a teller's stamp on the face of the check as indicative of the fact that the check had been cashed rather than deposited, do you recall that?

A. I do.

Q. And the significant feature was that at the bottom of the teller's stamp there were the figures "111," is that right?

A. I said that that was not always indicative of the cashed stamp; sometimes the "111" was put on and sometimes it was not.

Q. Do you know, from your examination, how many checks that—I believe it was the First National Bank of Nevada—that their practice, whether they always followed it or not, that their practice

(Testimony of Harry Green.)

is to use a stamp with "111" on the bottom, designating checks that have not been deposited?

A. They use that stamp or they use it, this stamp, without "111." It just depends on the clerk.

Q. What do they use when the check is deposited?

A. They don't do anything on the face of the check.

Q. They put no stamp on at all?

A. There is a clearing stamp, on the bottom of the check to be deposited.

Q. You are sure that "111" is the distinguishing feature to distinguish between checks that are cashed and checks that are deposited?

A. All I can say to that, Mr. Avakian, is that as a general rule they use "111" to show the cashed check, but quite often, I [339] believe even in my own checks, that "111" does not appear.

Q. In order that the jury may get an idea what the witness and I are talking about, your Honor, I would like to reproduce, with apologies, if I may, the nature of this stamp. Can you see this from there, Mr. Green? A. Yes.

(Counsel draws on blackboard.)

Q. That in general is the shape of the stamp and type of figures put on, is that correct?

A. That is correct.

Q. Do you know what the number two means?

A. I am not sure of that. One of those symbols there means the particular teller's number, which I am not sure.

(Testimony of Harry Green.)

Q. To refresh your recollection, I suggest that the top figure No. 2 refers to the branch of the bank, the middle figure refers to the clearing house number, the bottom figure refers to the particular teller.

A. The bottom being the teller, I am not sure.

Q. And when the "111" figure is used — this stamp has the figure "111" underneath it, is that correct? A. That is correct.

Q. And the custom is to use this figure "111" to designate checks which were cashed?

Mr. Maxwell: That has been asked and answered three times. [340]

Q. I am going to show you your three checks issued to Dr. Kelley, which are in evidence, No. 119, the first on May 2nd for \$5, the second on May 5th for \$20, and the third on May 17th for \$10. Will you tell me which of those checks has the "111" underneath the stamp?

A. The last named check.

Q. And aside from that one, the first two do not have the "111," is that right?

A. That is correct.

Q. When you received these checks, did you receive them at one time from the bank, in one statement?

A. Yes, I did, because they all cleared during the month of May.

Q. And after examining these three checks, then, you decided that you wanted to have a look at Dr. Kelley's returns, is that correct?

(Testimony of Harry Green.)

A. That is right.

Q. How soon did you do that?

A. Well, it would be difficult to say exactly, in terms of days. Some time over a period, I would say, a month or two months.

Q. In other words, it would have been June or July, 1951? A. Possibly July.

Q. Just what did you do in that connection, will you tell us?

A. To the best of my recollection, I went over to the [341] Collector's office in Reno, which at that time was separate from our office, in the Clay Peters Building, and they kept the returns there. I wanted to look at one or two of the doctor's returns. I don't remember now whether I wanted to look at 1949, 1950 or 1948, it was one of them, and in that connection I found one of those returns, I believe 1949, was already under an office audit or examination by the office, in the safe of the former collector's office.

Q. At that time, Mr. Green, was the Internal Revenue Office, of which you were a member, independent from the office of the Internal Revenue Collector? A. Yes, we were.

Q. The collector of the Internal Revenue in the State of Nevada had no jurisdiction over you as an agent, is that right? A. That is correct.

Q. And your status as an agent placed you actually in the branch of the Bureau of Internal Revenue, which had its main office in San Francisco? A. That is correct.

(Testimony of Harry Green.)

Q. And that included the northern part of California, as well as Nevada? A. Yes.

Q. And perhaps other areas also?

A. Northern California and Nevada.

Q. At that time were there other agents as deputy collectors [342] located in the office of the Collector of Internal Revenue in Reno, who conducted examinations of tax returns?

A. Yes, there were.

Q. And it was that type of examination for which Dr. Kelley's return had been scheduled when you made inquiry about it, I mean examination by a deputy collector?

A. As I recall, it wasn't what we call a deputy collector, more an office auditor.

Q. I believe you said there was some question involving cost of deduction of airplane expenses?

A. That is right.

Q. And normally would that have meant that the deputy collector had gone through on the investigation, would have gotten in touch with Dr. Kelley and asked him some questions about his airplane deductions? A. Yes, that's correct.

Q. So that he wouldn't have done his work just in the office; he would actually have contacted the taxpayer, would he not?

A. He would have him probably in the office, either by phone or correspondence, or have the doctor come in personally.

Q. Didn't deputy collectors go out on calls and check records? A. Not this particular one.

(Testimony of Harry Green.)

Q. They don't do this, they stay in the office? I don't understand your answer.

A. In this particular case, this woman did her work in the [343] office. She didn't go out on cases.

Q. You made the request to have Dr. Kelley's return, or returns, assigned to the Internal Revenue Agents office in San Francisco for investigation, if I understood you correctly, is that right?

A. I didn't make the request; I suggested such an action be done.

Q. To whom did you make that suggestion?

A. To the office auditor who had the doctor's returns at the time.

Q. Was that actually done? A. It was.

Q. And did you do anything further in connection with that, after you made your suggestion?

A. Of what period of time are you talking?

Q. The period between then and the time the returns were sent into the Internal Revenue Agents office in Reno, did you do anything further in connection with having that transfer made?

A. No sir, I did not.

Q. I take it, after the returns had been referred by the Collector to the San Francisco office of your division, they were sent by your division in San Francisco to your office in Reno, is that right?

A. Yes, with specific assignment to, in this case, Mr. Heppner.

(Testimony of Harry Green.)

Q. He was an Internal Revenue agent like yourself?
A. Right. [344]

Q. Approximately how many Revenue agents were there in Reno at that time?
A. Six.

Q. Do you know who made the assignment to Mr. Heppner?

A. It could only be a guess, Mr. Avakian.

Q. Well, if you don't know, that is the answer to my question. After you made the suggestion to the lady in the Collector's office, when was the next time that you made inquiry, or acquired any knowledge, of the status of the investigation of Dr. Kelley's returns?

A. Probably the latter part of 1951, when Mr. Heppner received the returns and I don't know whether he called my attention to it, he probably did, or whether it happened they came in in an envelope from San Francisco. All returns were sent in one big envelope and whatever agent happened to be there at the time opened and made distribution of the returns, as per instructions in the envelope.

Q. I take it you don't really remember at this time whether you saw the return yourself or Mr. Heppner told you?

A. I don't recall that. I know he finally handed it to me.

Q. Had you talked to Mr. Heppner before he contacted Dr. Kelley, if you know?

A. I know I talked to him. As to whether I

(Testimony of Harry Green.)

talked to him before the first time he talked to Dr. Kelley, I don't recall. I did talk to him on one time before he went out to see the doctor. [345]

Q. Do you recall what that conversation was?

A. Mr. Heppner had already known I had been a patient of the doctor's and I don't remember whether I told him or whether it was his idea to look at my card and see what it was.

Q. You don't remember as to whether it was his idea or your suggestion that he do that?

A. It was probably a meeting of the minds.

Q. I would like your best recollection as to which it was, if you have one.

Mr. Maxwell: Objected to as asked and answered.

The Court: The witness can say whether he recollects or not. You may answer the question.

A. It is a pretty hard question to answer, because we had discussed things very briefly, in view of the fact that Mr. Heppner saw the checks had been cashed, so whether I gave him specific instructions in regard to my card, I can't say.

Q. But you told Mr. Heppner that you had made the suggestion to the Collector's office that Dr. Kelley's returns be assigned to the Internal Revenue Agency?

A. I don't remember.

Q. Do you remember whether you told him that at any later time or at any time?

A. All I can say is that I may have. I don't remember the conversation now.

Q. I believe you testified that on February 29, 1952, you sat in with Mr. Heppner in a confer-

(Testimony of Harry Green.)

ence with Dr. Kelley in the [346] agent's office in Reno, do you recall your testimony in that regard?

A. Yes, sir.

Q. How do you remember that that was on February 29, 1952?

A. Because I had a memorandum.

Q. You mean before you testified you refreshed your recollection by looking at the memorandum, is that how you fix the date?

A. I had various ways of finding out.

Q. I am just trying to find out how you did.

Q. Well, to tie in the date, I had the memorandum—you might call it a diary—that I keep, referring to various dates on various cases.

Q. As a matter of fact, you have to refer to such a memorandum in order to fix the date on that, wouldn't you, Mr. Green?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

The Court: You may answer.

A. Without that, I could probably only say that it was in February, 1952. I do know, even without the memorandum, I remember the month and the year.

Q. If I asked you to give me the dates on which you helped other agents to check things with respect to investigations of taxpayers they were investigating, would you be able, without referring to your notes, to give me the dates on which you sat in on such conferences? [347]

Mr. Brown: Objected to as entirely argumenta-

(Testimony of Harry Green.)

tive. It is asking the witness for his mind process.

The Court: Objection overruled.

A. Would you mind repeating the question?

Q. Not at all. If I were to ask you to give me the specific dates on which you sat in, took notes, with other agents in connection with their investigations of taxpayer's returns they were investigating, would you be able to recite from memory the specific exact dates on which you did that, without referring back to your memorandum?

Mr. Brown: Would the Court entertain a further objection?

The Court: Yes.

Mr. Brown: It is entirely irrelevant to any issue before the Court at this time.

The Court: It is cross examination, counsel, is testing the witness's veracity. You may answer.

A. I would probably have to refer to my notes.

Q. You say you would probably?

A. Yes, I work with a number of agents, hundreds of cases. My memory isn't that good.

Q. I don't think it would be; mine isn't. Isn't it true, Mr. Green, before you took the stand in this case, you refreshed your recollection by looking at the memorandum or notes you made at that particular conference? [348]

A. Yes, I did.

Q. Fine, thank you. Are you able to tell us how it was that you were the particular agent who happened to sit in with Mr. Heppner in the interview?

A. To the best of my recollection, I believe I

(Testimony of Harry Green.)

was the only other agent in the office at the time and Mr. Heppner is required to have another agent as a witness when questioning the doctor on financial matters.

Q. How many agents did you say were working in the Reno office? A. Six.

Q. And the other four were out on other jobs?

A. That is my recollection, they were.

Q. Was this by pre-arrangement that you sat in with Mr. Heppner, or did he just happen to see you there when Dr. Kelley came in?

A. It wasn't any more pre-arrangement than—it wasn't planned for days and weeks ahead I would be there. It just happened at the moment.

Q. Now you testified at great length on direct examination as to the statements that Dr. Kelley made at that conference on February 2, 1952. Do you recall, without going into the details now, recall that you gave detailed testimony on that this morning?

Mr. Brown: Objected to as argumentative.

The Court: He testified, that is correct. [349]

Mr. Maxwell: The government will so stipulate.

Q. Mr. Green, at that conference, did you and Mr. Heppner both take notes?

A. Yes, we did.

Q. Did you both ask questions?

A. Yes sir, we did.

Q. Did you both take notes on the same subject matter, or did one take notes while the other was questioning?

(Testimony of Harry Green.)

A. As I remember, I took the bulk of the notes while we were both asking questions. On one occasion Mr. Heppner happened to take down when I was asking questions. To my recollection, we both took the same notes at the same time.

Q. Where are those notes now?

Mr. Maxwell: Objected to as immaterial.

A. They are in the possession of the Internal Revenue.

Q. Do Mr. Brown or Mr. Maxwell have them?

A. Yes.

Q. Do you recall when you delivered them, or were you the one who delivered them?

A. I can't even answer that, because it went with the case file with my report, when the audit went in.

Q. Have you got all those work notes in some other memorandum or report? A. In what?

Q. I don't know, I was asking you. Let me re-frame the question. [350] Did you take the information that is on the notes that you hold, did you take and transcript those notes into some report or some other memoranda which was prepared in connection with this case?

Mr. Maxwell: Objected to as immaterial.

A. In answer to that I can only say that I submitted my report in 1954. Various parts of the memorandum were incorporated in my audit notes.

Q. Now you testified among other things this morning that at that conference on February 29, 1952 Dr. Kelley stated that he had a cash accumu-

(Testimony of Harry Green.)

lation of 50 thousand dollars in 1928. Do you remember that figure and that year from your independent recollection, or did you refresh your recollection before testifying, by looking at any portions of your file?

A. I remember the figure and the year because it was so unusual, and then I did look at my notes to see if it was the same.

Q. When did you look at your notes?

A. Probably just within the last few days.

Q. And are these the notes that are in the possession of Mr. Brown and Mr. Maxwell?

A. Yes.

Q. You testified in considerable detail, regarding other things that Dr. Kelley said in that conference four year ago. Did you, at this same time, a few days ago, refer to those notes in regard to the other things that he said that you testified to?

Mr. Maxwell: Objected to as characterization of the witness's testimony, that he went into considerable detail. I will stipulate he so testified.

Mr. Avakian: I will strike out the word "considerable."

Q. With regard to the other specific detailed items that you mentioned, that Dr. Kelley said in that conference four years ago, did you, in preparation for this trial, examine your notes of that conference?

A. I did, to refresh my memory.

Q. You quoted the doctor as using the words "backed up" when you testified this morning. Did

(Testimony of Harry Green.)

you refresh your recollection on that quotation by looking at your notes?

A. Again I remembered, before looking at my notes, he used that phrase, and my notes bore that out.

Q. In other words, Mr. Green, I take it your testimony is that even without looking at your notes, you were able to remember that some four years ago a taxpayer, whose return was assigned to another agent, used the words "backed up" in a conference. Is that your testimony?

A. That is correct. In all unusual things I remember it.

Q. And you testified that Dr. Kelley told you that in 1947 he brought some money out from Hubbardsville by suitcase and by train. Would you tell us, as nearly as you can remember, just what Dr. Kelley said in that connection? [352]

A. That is practically what he told me.

Q. Did he say what train he took or whether all of the trip was by train or only a part?

A. He said he brought it partly by plane and the rest of the way by train.

Q. Did he tell you how much of each?

A. In 1947——

Q. I am talking about the first trip.

A. Yes, in 1947, I don't remember whether it was 50 or 60 thousand he brought out at that time.

Q. I am not asking as to the amount. I am asking as to the means of transportation. What did he tell you as to the means of transportation?

(Testimony of Harry Green.)

A. He said he brought it out by plane to Salt Lake City and train from there to Reno.

Q. He said he took a plane from Hubbardsville to Salt Lake City?

A. He said he brought it by plane to Salt Lake City. We didn't ask him where he got the plane, what city he got on the plane. We merely asked him the general question as to the means of transportation he used in bringing out this money.

Q. And you are sure that he said nothing further as to why he came part way by plane and part way by train?

A. No, I don't recall. He didn't say anything on that point.

Q. Are you prepared to say he didn't say anything on that point?

Mr. Maxwell: Objected to as argumentative. He says [353] he doesn't recall.

The Court: Objection sustained.

Mr. Avakian: At this time, in view of the witness's testimony that he referred to the notes that were made in connection with this trial within the last few days, I would make demand of the government to produce them for examination, the notes or memorandum that were examined by the agent to refresh his recollection.

Mr. Brown: The rule requires production of the notes the witness testified from.

The Court: The Court will take this motion under advisement.

(Testimony of Harry Green.)

Q. When was this matter assigned to you to investigate, Mr. Green?

A. I believe I testified it was assigned to me in January, 1953.

Q. And then you did nothing on the case, by way of investigation or audit until October of that year?

A. That is correct.

Q. Did you, or did you not, ask Dr. and Mrs. Kelley to sign extension of the statute of limitation?

A. I have already said I did.

Q. My notes state that you said you might have. It is true that you did, isn't that right?

A. Well, I possibly did. Whether I specifically did, I don't [354] know. I do know that consents were obtained in the early part of the period.

Q. If you possibly did it, it was on your initiative, was it not?

A. Probably.

Q. The agent is responsible for getting extensions if he is not going to complete it in a reasonable period, is that right?

A. Yes.

Q. Did Dr. and Mrs. Kelley sign all extensions of the statute of limitations which you or your office requested of them?

A. Yes.

Q. At the time you went to Dr. Kelley's office to get the patient cards, can you tell me again what the date of that was?

A. October 5, 1953 was the first time I talked to him. I think the next day I obtained the cards.

Q. In what container were those cards held before you took them? What kind of a container?

A. In the type of container which they are now.

(Testimony of Harry Green.)

Q. Was that a paper box?

A. That is what I remember.

Q. Weren't they in a metal file box, Mr. Green?

A. You are referring to what they were contained in before I took them out?

Q. Before you took them out, how did the doctor keep them?

A. I don't remember whether they were in a metal or cardboard [355] box. It is my recollection that I obtained the box to put them in to take them out.

Q. Do you have a recollection as to whether the doctor stored them in a metal box?

A. I do not know.

Q. At the time you went there in October of 1953, had you already been informed by Mr. Heppner that he had looked for your patient card?

A. Yes sir, I had.

Q. What did he tell you?

A. That he couldn't find it.

Q. So that when you went to get these cards, you knew then that there was a possibility of missing patient cards becoming an issue in this case, did you not?

Mr. Maxwell: Objected to as calling for conclusion of the witness.

Mr. Avakian: I think it is quite pertinent.

The Court: He may answer if he knows. Objection overruled.

A. I really didn't know. All I knew of my own knowledge was that my card was not found when

(Testimony of Harry Green.)

Mr. Heppner took the cards. Whether there were other cards missing, that would only be an assumption.

Q. Mr. Green, to you, as an agent, didn't the fact that Mr. Heppner had told you that one card was missing, suggest that [356] that was an area of inquiry for you as an auditor for the Internal Revenue?

A. That would be an item that would require further checking, yes.

Q. And isn't that something that would alert you to look for possibility of other missing patient cards? Wouldn't you, as an agent, just naturally follow up on that sort of thing?

A. I certainly would.

Q. Nevertheless, you took these cards without giving any receipt, is that correct?

A. Right, for the reasons stated.

Q. Did it occur to you that in the event you made an issue at some later time of missing cards, that you might be criticized for not having given a receipt, to eliminate the possibility that you might have lost some.

Mr. Maxwell: Objected to as calling for speculation of the witness.

The Court: Objection overruled. You may answer.

A. Would you mind stating your question again?

(Question read.)

A. I realized that possibility. That is why I

(Testimony of Harry Green.)

explained to the doctor that, in view of the tremendous number of cards, he would have to rely on my good word I would bring back every card I had taken.

Q. As a matter of fact, you did not take back every card? [357]

A. It was certainly an oversight.

Q. You don't know how many other cards might have been misplaced by oversight?

A. To the best of my knowledge, those were the only three cards that were held out.

Q. Incidentally, when did you first find out that those cards had been held out?

A. I believe it was just before the trial this morning.

Q. Can't you give us any more specific than that? A. I can't.

Q. Wasn't this a very unusual thing to find some cards, after you had reported and returned everything to the taxpayer?

A. No—it was unusual to find the cards, yes, but in this particular case you had to bear in mind that my examination was completed in the early part of 1954. Mr. Black, who worked with me on the case, then had occasion to write his report and in the interim he was transferred to San Francisco. Now there were folders going back and forth and as near as I can tell that is the reason we did not discover it sooner.

Q. What I am trying to find out is just when was it that you uncovered this fact?

(Testimony of Harry Green.)

A. To my knowledge, it was just a little while before the trial.

Q. Can you give me the date?

A. No, I can't.

Q. Was it less than two weeks ago? [358]

A. It may have been two weeks, may have been a month ago.

Q. Could it have been February 29th?

A. I don't think so.

Q. How did you discover that these cards were still in the possession of the Internal Revenue?

A. Looking over some of the folders one day that had superseded the new work sheets, I found these cards.

Q. Where were they? A. In the folders.

Q. Did you then find them? A. Yes.

Q. What folder did you find them in? Were they all together or in different folders?

A. All together.

Q. In one folder? A. Yes.

Q. But you can't remember what folder that was? A. No.

Q. What did you do next with respect to the discovery of these cards, after the discovery?

A. I informed Mr. Maxwell and Mr. Brown that I found them.

Q. Was that before the trial started?

A. I believe so.

Q. Let us see if we can make it more definite as to your belief. Were you present when Mr.

(Testimony of Harry Green.)

Maxwell make the opening [359] statement in this case, in which he referred to missing cards?

A. Yes.

Q. At that time had you already told him that you had some of these cards?

A. I believe I did.

Q. You are not sure, Mr. Green?

A. No, honestly I am not. I know I notified Mr. Brown when I found the cards. The exact date I do not remember and I don't know whether it was before the opening statement or not.

Q. You returned various records to Dr. Kelley in December, 1953, did you not?

A. Mr. Black and I did.

Q. At that time were you of the belief that you had returned to Dr. Kelley every single one of the records you had obtained from him?

A. Yes, I was.

Q. You were confident of that; in fact, you said so, did you not? A. Yes.

Q. Can you tell me on how many other occasions you have located in the Internal Revenue files, records of a taxpayer, after you had informed the taxpayer that you had returned all of his records to him?

Mr. Brown: We will object to that, your Honor, things that would have been between other parties not parties to this [360] transaction, are irrelevant and immaterial.

The Court: Objection sustained.

Mr. Brown: I request the Court to admonish

(Testimony of Harry Green.)

the jury to disregard the question. I think it is highly prejudicial.

The Court: Ladies and gentlemen, you are given the usual admonition by the Court, any questions asked that the Court may consider objectionable, you are not to consider.

Q. Do you remember the specific person to whom you gave these patient cards after you discovered them?

A. I believe both Mr. Maxwell and Mr. Brown were present when I gave them. I said, "Here they are."

Q. Do you remember where that was?

A. No, it was back in Reno, it was back in Reno, I know that.

Q. Is there a possibility it was in Carson City?

A. No.

Q. You are sure it was in Reno? A. Yes.

Q. Do you remember where in Reno, Mr. Green?

A. We do most of our work there.

Q. I am asking about the return of these particular cards. Can you tell me, if you know, where you returned those cards?

A. I am not sure. I know it was turned over to them in that building, whether in that room or in the Internal Revenue office a floor down, I don't know.

Q. Did you have any discussion with them about this matter [361] that would refresh your recollection? A. No.

(Testimony of Harry Green.)

Q. There was no discussion at all, you just handed them across?

A. That I had found the cards in the folders.

Q. You said folders?

A. I mean folder. It was always one folder.

Q. Has any of this questioning refreshed your recollection as to what folder that was?

A. No.

Q. You stated that before you took the patient cards, you explained to Dr. Kelley that he had the legal right not to let you take them, is that correct? Did I understand you right?

A. That is correct.

Q. He nevertheless said that you could take them, is that right? A. That's right.

Q. As a matter of fact, you could have worked on these patient cards in Dr. Kelley's home, without ever removing them from the premises, under his control, is that right, Mr. Green?

A. It would be very difficult with three children running around the house.

Q. Well, he has a finished room in the basement that is available for work space, is that right?

A. I don't know.

Q. Did you make any inquiry about that?

A. No. [362]

Q. Incidentally, did you also advise Dr. Kelley that he didn't have to discuss these matters with you under the law, if he did not want to?

A. No sir, regular routine examination.

Q. You later advised him of that, is that right?

(Testimony of Harry Green.)

A. No.

Q. You do not recall ever advising him?

A. That he didn't have to discuss these matters with us? I believe that he came up for a statement in Mr. Black's office and Mr. Black gave him that information.

Q. Were you present then?

A. I was present.

Q. And Mr. Black advised him he didn't have to answer any of your questions under the law, if he didn't want to, is that what he advised him, he didn't have to answer any questions if he didn't want to? A. To my knowledge, yes.

Q. He nevertheless permitted you to question him, did he not?

A. He had his attorney present.

Q. His attorney, for the record, is Mr. Lohse?

A. Yes, sir.

Q. And that one time, is that right?

A. Correct.

Q. Did you ever make a request of the doctor or Mrs. Kelley which they declined? [363]

A. Not that I recall.

Q. Have you prepared any report in this matter which set forth your conclusions as to the amount of income of Dr. and Mrs. Kelley?

Mr. Maxwell: Objected to as immaterial.

Mr. Avakian: I am not asking as to the contents, but simply if he prepared a report.

The Court: What do you mean by report?

Q. A report which would have been submitted

(Testimony of Harry Green.)

to his superiors, setting forth the results of his investigation, with respect to the amount of tax liability.

The Court: I don't understand it.

Mr. Avakian: Possibly I can develop it this way, your Honor.

Q. Is it the normal practice of the Revenue agents, Mr. Green, and yourself, when you concluded investigations to write up a report?

A. Yes.

Q. That is called a Revenue agent's report, is it not? A. Yes.

Q. Commonly abbreviated "RAR"?

A. Yes.

Q. And that sets forth your conclusions as to the amount of adjustments, if any, should be made in the return, with respect to income and taxes, does it not? [364]

Mr. Maxwell: Your Honor please, I believe that is completely immaterial in this case. Any question of civil liability of the defendant is not in issue here.

Mr. Avakian: I think it has a bearing, your Honor.

The Court: You may answer.

Q. I will repeat it. The RAR sets forth the results of your investigation in terms of the adjustments which you think should be made in connection with the income and taxes shown on the taxpayer's return, is that correct?

A. That is correct.

(Testimony of Harry Green.)

Q. And sets forth whatever explanation you may include in connection with those efforts?

A. Yes.

Q. Now, without asking you at this point the contents of your report, did you submit that report in this case?

Mr. Maxwell: Objected to as immaterial. On the further grounds it is not in issue here.

The Court: Objection overruled.

A. Yes, I did.

Q. Was there anything in that report, anything reflected in that report, that was tied in in any way with any of these three missing patient cards, particularly the Florence Case card?

Mr. Maxwell: If the Court please, counsel is now asking the witness what is in the report, which he knows is not proper in the first place; in the second place, that is a matter [365] relating to civil liability, which is not in issue in this case.

The Court: As the Court looks at it, the question of these three cards has been raised and counsel has merely asked if the report—you may answer.

A. To the best of my recollection, the three cards played no part in the adjustment arrangement.

Q. You say to the best of your recollection. Are you quite sure of that, or can you refresh your recollection if you refer back to any files or reports at the office?

A. I do not think I need to refer back. I will say that it did not.

(Testimony of Harry Green.)

Q. You are willing to say that?

A. Yes sir.

Q. Had the folder, in which these cards were contained, been in the possession of any agent other than yourself?

Mr. Maxwell: Objected to as immaterial.

Mr. Avakian: I think we are entitled, your Honor, to explore the review of these things.

The Court: Objection sustained. He has explained how the cards were prepared.

Q. Mr. Green, when you were testifying this afternoon, regarding cash available to Dr. Kelley for expenditures in the years 1949 to 1952, you included in 1949 the cashing of a thousand dollar bond, the proceeds of which were not deposited in a bank. Do you recall that? [366]

A. Yes sir.

Q. You did not include the cashing of any bonds in 1950. Is it not true that your investigation showed that he cashed bonds in 1950, portions of which were not deposited in the bank?

A. The investigation that we made showed that the vast majority of the cashed bonds in 1950 went into the bank, were presented in deposits. Any small amounts that did not appear in there wound up in stocks and other assets.

Q. To the extent that happened, those other assets were used for bonds? A. Yes.

Q. And the sale of war bonds was available for cash for the purchase of other assets, is that correct?

(Testimony of Harry Green.)

A. The investigation did not show, as I recall now, any bonds being used in 1950 for the purchase of securities. They all went into the bank account.

Q. Do the notes which you have there show what was realized from the sale of bonds in 1950?

A. No, they do not.

Q. I call your attention to Exhibit 118; that shows that in 1950 bonds were cashed and figures contained there is not proceeds but cost of those bonds. Would you give us the cost figure there?

A. This is the cost figure.

Q. Yes, would you state it?

A. \$24,862.50. [367]

Q. Now the proceeds would include any interest earned on those bonds? A. That is correct.

Q. Can you tell, by referring to any of your notes or to the tax returns, tell me how much that was? A. The amount of interest?

Q. Yes, would you state the amount of interest on the sale of war bonds in 1950?

A. There is no detail on it. I may have notes here—\$1086.

Q. So that over 26 thousand dollars was realized from the sale of bonds in 1950, is that right?

A. That is correct.

Q. And I take it you are not able to tell me at this point how much of that was not deposited?

A. It was all deposited.

Q. Are you quite sure of that? A. Yes.

Q. How about 1951? I will give you the figure of cost and you can add the interest figure. Exhibit

(Testimony of Harry Green.)

118 shows bonds cost \$7,537.50 were cashed in that year. How much would that be for interest?

A. \$1095.

Q. So roughly \$8500, is that right?

A. Right.

Q. And do you know whether or not that was all deposited? [368]

A. May I have just a moment please?

Q. Surely.

A. May I read from my work papers?

Q. If you just give us conclusions, that will satisfy me, Mr. Green.

A. In the year 1950 there was realized from bonds \$25,948.50, of which the entire amount went into the bank account. The year 1951, including interest and principal cost, the amount realized was \$8,257.50, also in bank account.

Q. Mr. Green, among the papers that you obtained from Dr. and Mrs. Kelley, was there copy of the 1951 tax return? A. Yes.

Q. And did that have attached to it an adding machine tape? A. Yes.

Q. I am going to ask you if the document, which I am now showing you, is the document you have seen with the tape attached to it?

A. I believe so, yes. I don't remember these notes on the dividends attached.

Mr. Avakian: Your Honor, I would like to offer this in evidence at this time as defendant's exhibit next in order. Since it is lengthy, I might state, for the information of counsel, that the important

(Testimony of Harry Green.)

items are the adding machine tape and item on the return that refers to the interest.

The Court: The offer will be received in evidence as [368-A] defendant's Exhibit D.

Q. Mr. Green, did you examine this adding machine tape and this note of the figures on it in connection with your examination?

A. Yes, I have seen that tape and used it in tying up the interest reported for that year.

Q. Did you find any error in the interest reported for that year? A. As I recall, no.

Q. Did you learn, from your examination of this, that the adding machine tape was prepared by the bank where the bonds had been cashed?

A. I had no knowledge of that.

Q. The adding machine tape shows, in the upper part, the amounts realized on each individual bond, does it not?

A. I can't tell without looking at it.

Q. All right, I will bring it back.

A. That appears to be the case.

Q. And at the lower part of the tape it lists the cost price of the individual bonds, isn't that right?

A. Yes, that must be the case, yes.

Q. And there is calculated the difference between the total cost price and the total proceeds in arriving at the amount of interest, is that right?

A. Yes.

Q. And that figure is carried forward into the returns as interest? [369]

(Testimony of Harry Green.)

A. In this particular case the \$1005 in that return shows \$1095.

Q. I call your attention to the very top of the adding machine tape, where in for sale there is reference to two individual bonds with \$90 interest figure. That makes up the difference, does it not?

A. Yes.

Q. Would you match the proceeds of the bonds with the bottom portion of the tape, which lists the cost of the bonds, and tell me if you do not find from that that the section for interest fails to include the cost of one bond that was sold for \$470? Take as long as you need.

A. The only way I can do that is to count these by number.

Q. I think you can group them by size of bonds and match them in that way.

Mr. Maxwell: Would the stipulation we have entered into as bonds assist the witness in any way, counsel?

Mr. Avakian: No, I think it can be done best by matching.

A. Now there are a number of \$75 bonds which are detailed as to gross proceeds, but we did not try to match them and all you have is a summary figure.

Q. Show me the item you have in mind. Will you count the number of \$75 bonds mentioned? These are \$100 bonds costing \$75, [370] is that right? Count them yourself and give me the total?

A. Thirty-three \$75 bonds.

(Testimony of Harry Green.)

Q. Thirty-three bonds of \$100 face value, which cost \$75, is that right?

A. That is correct. That is what the top portions show.

Q. Can you find a figure which represents 33 times 75 in the cost section? A. Yes, 2475.

Q. So it is in there, is that right? A. Yes.

Q. Now there are in all five items left on the upper portion. Can you match those with anything in the lower portion?

A. Yes, I can. I can match the thousand dollar bond to the \$750 bond here.

Q. There are four of those?

A. That is right.

Q. You find on the upper portion \$470 realized on the sale of the bonds, is that right?

A. Yes.

Q. That would be five hundred face value?

A. Yes.

Q. And they cost \$375, do they not?

A. \$375 or \$350, I am not sure.

Mr. Avakian: Perhaps counsel will stipulate \$375 is the cost of a \$500 bond. [371]

Mr. Maxwell: I wouldn't know.

Q. Did you find any cost in the cost section of the tape to match up with the \$470 sale?

A. No sir, I did not.

Q. Is it not correct, then, that because of that amount of interest from the bonds reported on the income tax return was overstated on that \$500 bond?

(Testimony of Harry Green.)

Mr. Maxwell: If you know.

A. From this tape, I would have to say yes.

Q. Let us see if we can give the cost. \$25.00 bond cost \$18.75; \$50 bond cost \$37.50; \$500 bond cost \$375, isn't that right?

A. Or 350, I am not sure which is correct—I believe \$375.

Q. Thank you. Now then, Mr. Green, in your examination of that return and that tape, you failed to find that the taxpayers had made an error against their interest of \$375, is that right?

A. Probably, yes.

Q. Not probably, it is a fact, isn't it?

A. That was not the whole basis of my investigation.

Q. The fact is that you failed to find that error in payment, isn't that correct? Do you understand the question?

A. I understand your question. I am referring to my work sheet. I don't remember now. I don't have my original work sheet. However, that wasn't the basis of the examination.

Q. If you find in the overnight recess, from examination of [372] other papers that you had caught this error, would you let me know tomorrow? A. Yes.

Q. Now you testified that at some later stage of the investigation Dr. Kelley's representative, Mr. Lyon, furnished you and Mr. Black with the reconciliation bank balances that you testified to?

A. Yes.

(Testimony of Harry Green.)

Q. He also gave you considerable other information which you requested, did he not?

A. He gave us various information, yes.

Q. He also presented to you the result of various items of accounting analysis in answer to questions.

Mr. Maxwell: Objected to, hearsay, calling for conclusion of the witness. Not proper cross examination of this witness.

The Court: You may answer.

A. Mr. Lyon did furnish us with certain information pertaining to expenses and bank account and life insurance and a few other items.

Q. And was that during 1954?

A. I believe it was. Without referring to any data in my folder, I think it was.

Q. Mr. Lyon didn't have any conversations or discussions with you, as Dr. Kelley's representative, until some time after December [373] of 1953, isn't that right?

A. Yes, that is correct.

(Jury admonished and recess taken at 4:00 p.m.)

Wednesday—April 4, 1956.

10:00 A.M.

Defendant present with counsel. Presence of the jury stipulated.

Mr. Brown: Your Honor please, the Court directed that memorandum be served on the question that was presented on presentation of the checks. The government's memorandum is in the

process of being typed. We should have it within the hour.

Mr. Avakian: May the record show we filed our request for the memorandum.

The Court: Yes, let the record show. You may proceed.

Mr. Brown: We would like an opportunity to argue it, your Honor.

The Court: We will consider that later.

MR. GREEN

resumes the witness stand on further

Cross Examination

Q. (By Mr. Avakian): Mr. Green, just a few more questions this morning. In reviewing my notes, I find that your testimony is that you took the patient cards from the doctor's office to your own office in October of 1953 and that those cards were returned in December of 1953. Now will you tell us where those cards were during [374] that intervening period? In whose custody and possession and tell us what was being done with them.

Q. First of all, Mr. Avakian, those cards were not held for that entire period. The first group of cards, which were obtained from the doctor, were obtained October 6, 1953 and I returned that group on November 6th, I believe, and at that time Mr. Black and I picked up the balance, which were finally returned in December. The matter of where the cards were and what was being done with them, the cards were in the Internal Revenue Service of-

(Testimony of Harry Green.)

fice, Post Office Building, Reno, Nevada, in my custody. They were being transcribed by me, and then after Mr. Black entered the case by him.

Q. And when did Mr. Black enter the case?

A. He entered the case formally, I believe, November 5th or 6th, 1953, which would be the time that Mr. Black and I went over to see the doctor.

Q. You say he entered the case formally—then was he in the case on some informal basis?

A. No, he was not. We were working independently of each other.

Q. Was he working on this case at that time?

A. He had his own job and I had mine.

Q. Your present knowledge of his entering on this case, then, was some time in November, 1953?

A. Yes.

Q. That was before you had returned the first batch of cards, [375] is that right?

A. It was almost the same time. It would only be a day or two—whether before the cards were returned—I know at the time the cards were returned, he went with me and I believe at the time he had a formal assignment to enter the case officially from the office.

Q. What I am getting at is this, did Mr. Black himself handle any of these first batch of cards or work on them in any way?

A. He may have, I am not sure.

Q. You say that you were transcribing these. Will you state what you were doing?

A. Yes, I was taking each patient card and list-

(Testimony of Harry Green.)

ing the names of the patient, address, and the amount of payments by years on a work sheet.

Q. Where were you doing this work?

A. In the Internal Revenue office.

Q. And you took the card out of the box and copied the data from it, is that correct?

A. Correct.

Q. And put the card back? A. Yes sir.

Q. And went on in that fashion. Over what period of time were you doing this, with respect to the first batch of cards?

A. I picked up the cards in October and returned them in November, so a period of a month.

Q. Were you also working on other matters during that same period of time?

A. I probably was. I would have to refer to my book that I keep the cases in. I probably had other cases.

Q. Isn't it a fact, Mr. Green, that during this period, while you were doing this transcribing, you would at times leave the cards and your working papers on your desk while you answered the telephone or went into another office or did something on another matter?

A. As far as leaving them on the desk and going into another room, at that particular time we only had this one room.

Q. You would at times go into other interviewing and see taxpayers?

A. If I had done that, everything would have been put away.

(Testimony of Harry Green.)

Q. Where did Mr. Black work on the cards?

A. To the best of my recollection, he worked part of the time in the same room I did and part of the time in his own office, which I believe then was just a couple of doors down the hall.

Q. When he worked in his own office, did he take the cards there?

Mr. Maxwell: We object as calling for hearsay. When I put Mr. Black on the stand, counsel will have ample opportunity to inquire about the cards and transcribing.

Mr. Avakian: I am not asking about hearsay, Mr. Green knows whether he took them or not.

Q. I am trying to find out whether some of these cards were moved from your office to Mr. Black's office, if you know.

A. I don't know.

Q. Was there any period of time when you and Mr. Black were both working on these cards, during the same period of time?

A. Oh yes, there was.

Q. Were any of these cards photostated?

A. To the best of my knowledge, I don't believe they were.

Q. Not a single one?

A. Not that I know of.

Q. Were some of these patient cards in groups that were stapled together; that is, single cards on a single patient, were they fastened with a staple?

A. I believe there were a few like that.

Q. In those instances, did you remove the staple,

(Testimony of Harry Green.)

or did you simply pull the card at the corner to look at the stapled cards?

A. I am not sure; I probably would not remove the staple.

Q. Would you pull them?

A. That is right.

Redirect Examination

Q. (By Mr. Maxwell): I believe you said Mr. Black came into the case at your request, in joint investigation?

A. He actually worked with me directly.

Q. Will you tell us what a formal request for joint [378] investigation is?

A. When we, as Internal agents, find evidence of a fraud, of what we believe might be evidence of a fraud, we immediately write a letter to our superiors, requesting cooperation of the Internal Revenue Service and indicating in our report—that is a memorandum type of report—what indication of fraud we have found.

Q. Mr. Green, yesterday counsel inquired at some length of you with respect to an interest on a bond overstated on one of the returns. I don't recall which one it was, do you?

A. Yes, 1951.

Q. Now did you last night further check your file on that matter? A. I did.

Q. And what did you find?

A. I found that Mr. Avakian was correct.

Q. And on the return——

(Testimony of Harry Green.)

A. On the return the interest income from the bond had been overstated. The taxpayer reported on this particular item of interest income \$470. The true interest income on this particular bond was \$95, an overstatement of \$375.

Q. Now did it appear that was an intentional overstatement of interest, or was it simply an inadvertent error?

Mr. Avakian: Well, your Honor, is Mr. Maxwell asking what the intent of the bank was? [379]

The Court: I don't know.

A. It appeared to be just an oversight.

Q. Now, Mr. Green, one other thing. If you will recall, yesterday—and with the indulgence of the Court and counsel, this likely would be more proper on direct than redirect——

Mr. Avakian: We have no objection.

Q. If you recall yesterday we discussed the use of currency by Dr. Kelley during 1949 to 1952?

A. Yes.

Q. And you gave certain items which indicated currency available during the years 1949-1952?

A. Correct.

Q. Now did you also look at the doctor's records with respect to his paid invoices and check register and find what invoices were paid by cash for the years 1949 and 1952?

A. Yes, I did.

Q. Now I wonder if you have those amounts for those years?

A. Yes, I do. For the year 1949 the amount

(Testimony of Harry Green.)

of invoices paid in cash, not reflected in the check register, was \$2,391.14. For the year 1950 the amount was \$1,784.40. For the year 1951 the amount was \$1,325.67. For the year 1952 the amount was \$1,857.63. There is one other point that should be brought out about the interest on the bond. The basis of my examination of the taxpayer was the net worth basis, which would have automatically taken into effect any overstatement of income by the [380] doctor on bonds and give him credit for the overstatement.

Q. In other words, that overstatement would be automatically accounted for in a net worth statement, is that correct? A. That is correct.

Mr. Maxwell: You may inquire.

Recross Examination

Q. (By Mr. Avakian): On that last point, Mr. Green, you didn't start out this case using net worth method, did you?

A. That is a difficult question, difficult to answer.

Q. Isn't it a fact, Mr. Green, that the custom, the practice which you follow, and which your office follows, in conducting audits generally, is to initially examine the return for possible errors and use the net worth method only if it develops, during the course of your examination, that you think the net worth method would more accurately reflect the taxpayer's income?

A. I believe that is probably true. That is a

(Testimony of Harry Green.)

question difficult to answer yes or no. On each case it is entirely different.

Q. Your answer, it is probably true, satisfies me.

A. I might add that we try to use whichever basis is determined to be most accurate.

Q. And the fact is, Mr. Green, that you looked at these returns to see if there were any errors on them which would have had the effect of proportionately reducing the doctor's tax, [381] didn't you?

A. I don't understand.

Q. Didn't you look to see if there was anything on his return which was wrong and which would work to his disadvantage?

A. Your Honor, I don't quite understand.

Q. When you make an examination of a taxpayer's return, don't you, as a matter of general procedure and practice, look to see if there is anything on that return which shows that the taxpayer made an error in his own favor?

A. We look at it from both standpoints. Our job is to determine the correct tax, whether that is overstated or understated.

Q. And the plain fact, to be honest, is that you just didn't catch this error on the bond interest, isn't that right?

A. I accepted the figures on the taxpayer's returns because I was applying the net worth method on my report and it wasn't necessary.

Q. But did you start out ignoring the return and using the net worth method, or did you go to the net worth method later?

(Testimony of Harry Green.)

A. I started out the investigation on the basis of supporting items of professional income, and the rest of the income reported was probably correct. We found otherwise.

Q. With respect to the amounts that were paid by cash, referring to the invoices that you just testified to, are those the invoices that you obtained from the doctor and Mrs. Kelley?

A. Yes sir, they are, which were returned and receipted for. [382]

Q. Now you testified on your redirect examination about a joint investigation and explained that by saying that when you agents found what you believed to be evidence of fraud, you wrote a report setting that forth. Did you write such a report, requesting joint investigation in this case?

A. I did.

Q. When was that report written?

A. I believe it was either November or December, November 6, 1953.

Q. That was at the time when you had the first portion of the doctor's patient cards, is that right?

A. Yes, it was.

Q. And it was before you had completed your analysis of that portion or not?

A. You can't really say whether it was from analysis made, because during that period of time it was simply a question of transcribing the patient cards and I was trying to find as to other items, especially bank deposits, which was included on there.

(Testimony of Harry Green.)

Q. In any event, you hadn't yet made any examination of the balance of the records?

A. I had looked at some of them.

Q. You said you took one batch back in November and got another batch then?

A. Yes. [383]

Q. At the time you wrote this report, requesting joint investigation, you hadn't yet examined the second batch, is that right?

A. That's true.

Mr. Avakian: That's all, thank you.

(Witness excused.)

ROBERT BLACK

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name? A. Robert Black.

Q. You have been previously sworn?

A. Yes.

Q. Where do you reside, Mr. Black?

A. San Mateo, California.

Q. What is your occupation?

A. Special Agent, Internal Revenue Service.

Q. When did you become a Special Agent for the Internal Revenue Service?

A. March, 1950.

Q. Where were you stationed at that time?

A. In San Francisco.

Q. Were you ever stationed in Reno?

(Testimony of Robert Black.)

A. Yes, I was. [384]

Q. When was that?

A. From August, 1953 to January, 1955.

Q. Prior to becoming a Special Agent, what was your occupation?

A. I was an accountant.

Q. For what concern?

A. Krasco Manufacturing Company.

Q. Can you describe what your job was?

A. It was accounting and office manager.

Q. Was it a manufacturing firm? A. Yes.

Q. Small or large? A. Small.

Q. Now, Mr. Black, did you attend a university?

A. Yes, I did.

Q. What university?

A. Southwestern University.

Q. And did you receive a degree from the Southwestern University?

A. Yes, Bachelor of Commercial Science.

Q. When did you receive that? A. 1949.

Q. Mr. Black, you had something to do with investigation of income tax liabilities of Wayne P. Kelley for the years 1949 to 1952, did you not?

A. Yes.

Q. And when did you begin your investigation?

A. I received assignment on the Kelley case on September 22, 1953.

Q. And did you thereafter discuss the case with Special Revenue Agent Green?

A. Yes, Special Agent Green.

(Testimony of Robert Black.)

Q. And after that date did you have any conversations with Dr. Kelley?

A. Yes, on November 6th I went with Mr. Green to the doctor's office and had a conversation.

Q. Now, Mr. Black, your assignment in September, was that a preliminary assignment, or a formal request to join the investigation?

A. Preliminary.

Q. When did you receive your formal assignment, do you recall?

A. I really don't know; I believe some time about the middle or latter part of November.

Q. I think you said you saw the doctor on November 6, 1953 for the first time?

A. That is the first time.

Q. Who was with you, if any one?

A. Mr. Green.

Q. Did Mr. Green have any of the doctor's records with him?

A. Yes, the purpose of our visit was to return records [386] Mr. Green had earlier picked up some records.

Q. Were those patient cards?

A. That was the records.

Q. Was there any one else present when you saw Dr. Kelley?

A. No one besides Mr. Green and Dr. Kelley.

Q. Can you tell us what was said at that date?

A. Yes, we asked him some questions as to the patient cards. He said all the income he received from medical practice was on the patient cards. He

(Testimony of Robert Black.)

said he destroyed some of his cards, which he referred to as "no goods"; that he said where a patient had paid their bills. We asked him about his checks and he said all his checks from medical practice were deposited, except on some occasions small checks were cashed. I believe he said the biggest was \$5 checks, in that amount.

Q. Did he say also that he cashed money orders?

A. No, he put money orders in the same category as cash, or those were also cashed. We asked him about his liabilities. I had seen the net worth statement he had given and there were no liabilities listed on the statement, so I asked him about that. He said he had no liabilities, and a little bit later he mentioned at one time he had a loan on a Ford, about 1946, and the reason he had a loan on the Ford was because his brother and sister had custody of some cash and he was without ready cash at the time, or was without ready cash.

Q. Did he say what year he had the loan? [387]

A. 1946.

Q. Did the doctor say anything as to the necessity of cashing checks?

A. Yes, when we asked him about his deposit of checks, he said it wasn't necessary to cash checks, that he had large cash reserve, he didn't have to cash checks for living purposes.

Q. Did he mention the extent of his income during the period at all?

A. No, I don't think we asked him about that,

(Testimony of Robert Black.)

other than to say that all of his medical income was reported on his patient cards.

Q. Did you thereafter have any further conferences or conversations with Dr. Kelley?

A. Yes, we did. We saw him about two or three times after that and returned the records and picked up additional records, but I do not believe there was any conversation. The next conversation we had with him was on February 4th. We arranged to go and see Dr. Kelley for a formal interview.

Q. Was Mr. Lohse present?

A. Yes, Mr. Lohse and Mr. Green were there. I was there and a stenographer, Mrs. Baldwin.

Q. What date was this?

A. February 4, 1954.

Q. Was Mr. Lohse present throughout the conversation? A. Yes. [388]

Q. Do you recall what was said at that time?

A. Yes, I recall we said several things. The first thing I believe we asked him was about his tax returns. He identified his returns from the years 1946 through 1952.

Q. Those are the same returns in evidence here?

A. That is correct. He said that he and his wife had prepared the returns and that the returns were prepared from deposit slips and his work sheets, which I believe contained monthly totals. We asked him some questions about his records. As I recall, he said that all of the checks and deposits were on deposit at the same bank, which would be the First

(Testimony of Robert Black.)

National Bank of Nevada. We discussed his cash on hand for the year. He submitted a net worth statement, showing \$19,000 cash on hand. We asked him about that and he said that that had been kept in Hubbardsville during the time he was in New York. He also said at one time that his sister knew this; that while he was in Reno the money was first kept in the refrigerator and subsequently put into a strong box. We asked him to list his bank accounts and he said they were all listed on the net worth statement.

Q. When you say net worth statement, be sure we are talking about the same thing. You refer there to Exhibit 121 in evidence?

A. Exhibit 121, yes, these are the net worth statements. We showed him these statements and he identified his signature to them. [389]

Q. His wife is the other one?

A. His wife signed the other one. He mentioned that all his bank accounts were listed on these net worth statements. I asked him if he had any other bank accounts, either in his own name or in the names of other parties not shown here and he said he had none. Now in regard to his records, we asked him if he still had all his records and he said some of his "no good" patient cards had been disposed of. He had receipt books only for the period of September 1951 through 1952. We asked him for prior receipt books and he said he discarded those.

Q. When you say receipt books, will you tell us what those are?

(Testimony of Robert Black.)

A. It was a bound book, containing duplicate copies of receipts he issued to the patient. These were carbon copies. We asked him about appointment books. He said he had discarded all his appointment books.

Q. Did he say anything with respect to whether or not all his income had been reported?

A. Yes, he said all the checks and cash and various things had been reported.

Q. Did he say who maintained his records?

A. He said he maintained his medical income records himself.

Q. Did you ask him anything about filing, how that was accomplished?

A. Yes, we asked him about filing. He said he took his records home for a period of one or two weeks at a time and [390] filed them there.

Q. Did you ask him about any non-taxable bonds he might have received during the years in question?

A. Yes, we asked him if he had any gifts or inheritances during the years 1946 to 1952 and he said no.

Q. Did you have any conversation with respect to mortgage on his airplane?

A. Yes, I remember something about that. He said at one time he had a paper mortgage and the explanation on that was that he merely had a paper mortgage on it and the purpose of that was to protect the seizure by one of his wives.

(Testimony of Robert Black.)

Q. Now did you, at that conference, ask him for information with respect to his living expenses?

A. Yes, we asked for a resume and he said at that time he would have to prepare that.

Q. Did you ever receive any information of his living expenses? A. No.

Q. Other than what you found in the records?

A. Other than what was in the records, that is right.

Q. Did Dr. Kelley tell you at that time who made the entries on the patient cards?

A. I believe he said he made the entries on the patient cards. I remember he did say that he maintained the records of his medical income.

Q. Mr. Black, did you look into the matter of purchase of stock [391] by Dr. Kelley from George McKaig, I believe in the amount of \$25,003.21?

A. Yes, we checked Mr. McKaig's records.

Q. Did you also check the doctor's records?

A. Yes.

Q. Did you find where a refund had been given by Mr. McKaig to Dr. Kelley? A. Yes.

Q. How much? A. \$750.

Q. When was that given?

A. I don't remember the date, sometime in 1952. I have the date in my records.

Q. Now did you, at any subsequent time, have a further conference with Dr. Kelley or his representatives?

A. Yes, we did. We talked to Mr. Lohse and Mr. Avakian several times. On one occasion we had a

(Testimony of Robert Black.)

conference with Mr. Lohse, Mr. Avakian and Mr. Lyon and Mr. Green.

Q. Other than the statements of Dr. Kelley, to which you have already testified, did you receive any further information with respect to cash on hand at that time? A. No, we did not.

Mr. Avakian: At what time?

Q. What was the date of that conversation?

A. I don't recall that date, I believe it was the latter part [392] of February.

Mr. Avakian: Is this the conference I attended up here?

Mr. Maxwell: I think so. Do you wish to supply the date?

Mr. Avakian: May I suggest June 9, 1954?

A. Some time after the conference with Dr. Kelley. June probably may be right.

Mr. Avakian: June 9, 1954, at 2:00 p.m.

Q. Did you receive certain records from Mr. Avakian at that time, or Mr. Lyon?

A. Not at that time, no. I believe it was decided at that conference that Mr. Avakian would allow certain records to be made available to us, but we actually received them some time later from Mr. Lyon.

Q. Did you receive any further information as to cash on hand? A. None at all.

Q. Did you ask for it? A. Yes.

Q. Did you, after that conference, receive for inspection work sheets attached to returns?

(Testimony of Robert Black.)

A. Yes, they were made available to us by Mr. Lyon.

Q. Those were Dr. Kelley's work sheets?

A. Yes.

Q. Do you recall whether they were handwritten or typewritten? [393]

A. As I recall, they were hand writing.

Q. Showing you some yellow sheets, defendant's Exhibit D, are those the work sheets you inspected?

A. Yes, these are the work sheets.

Q. That is for the year 1951? A. Yes.

Q. Did you inspect some sheets for the other three years in question, 1945 to 1952?

A. Yes, 1949-51-52. The work sheet for 1952 was not as complete in detail as this particular one.

Q. Now, Mr. Black, after you entered the case, did you and Mr. Green make transcripts of certain of Dr. Kelley's records? A. Yes, we did.

Q. What transcripts did you make?

A. Well, we transcribed some of his patient cards, partial transcript of patient cards; transcribed the available receipt books.

Q. Before you go into the other records, let us find out what you transcribed from the patient cards. Will you explain that?

A. Transcribed only those cards from which we could tell there was payment made during the years 1948 through '52.

Q. How is a patient card set up? I will put it on the blackboard. Now is this the type of patient card? Can you tell me how this was set up? Maybe

(Testimony of Robert Black.)

it would be better if you come down here and try to do this. I want the card relating to financial [394] transactions.

A. The name and address was on top of the card, and I believe it had some reference here to the patient's family, his father's name or his mother's name, and down here several lines, all the way across the bottom, is the column, date; second, was his medical history, and on the right side is three columns, first, for charge; second for payment, and I believe the last column the balance.

Q. Now you say you didn't transcribe all of the cards? A. Yes sir.

Q. Which ones did you transcribe?

A. Well, in the first place, some cards didn't contain the years, so we didn't transcribe those. We transcribed only those which it was positive told there was a payment made during the years we were investigating, 1948 through 1952.

Q. In other words, you transcribed only cards that had figures in the payment column or some other indication on the card?

A. Or some other indication of a payment. Now there were certain cards which had a charge and no other information. We don't know whether that charge was paid or not and we didn't always transcribe those cards. Now if the payment column had an entry and if we could always determine paid, we transcribed that card giving that information. Now in some cases the card would have a charge and a balance and a subsequent date the balance would be

(Testimony of Robert Black.)

reduced to zero, and the proper amount, we [395] would transcribe that.

Q. If the balance was down to zero?

A. If the balance was reduced to zero, or reduced.

Q. What other records did you transcribe or look at?

A. We transcribed the available duplicate receipt books, which was from the latter part of September, 1951 and through the year 1952. We transcribed his duplicate deposit slips, put those on the cards, and we also transcribed some records we had of his stocks and we transcribed his check register.

Q. Did you transcribe the check register, or did you say that?

A. The check register we did transcribe.

Q. I believe you said that Dr. Kelley informed you on February 4, 1954, of the manner in which he computed his medical income, is that correct?

A. Yes sir.

Q. I wonder if you would state that again?

A. He said he computed his medical income for his tax returns from duplicate deposit slips, and also that he used some work sheets which contained monthly totals of the deposit slips.

Q. Now you transcribed those documents, duplicate deposit slips and work sheets?

A. Yes, I did.

Q. Were you able to reconcile those documents with the reported receipts on the return?

A. Yes, we were. In each of those years, 1949,

(Testimony of Robert Black.)

1950 and 1951. [396] There were certain minor errors which we adjusted and were able to reconcile those with figures on the return. In 1952 we couldn't reconcile. We were off sixty cents.

Q. In other words, you were able to reconcile exactly for the first three years; for 1952 you were off sixty cents? A. Yes.

Mr. Maxwell: I will ask that the computation be marked for identification as government's exhibit next in order.

The Court: 126(a) marked for identification.

(Jury admonished and morning recess taken at 11:00 o'clock.)

11:15

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, you have in front of you Exhibit 126(a) for identification. Will you state what that is?

A. That is my reconciliation between the figures shown on the duplicate deposit slips, the doctor's work sheets and the tax returns.

Q. Does anything else enter into that computation? A. No. [397]

Q. What did you do then in making reconciliation on the medical receipts reported on the return?

(Testimony of Robert Black.)

Before you answer that question, let me hand you the income tax returns for 1949 and 1952.

A. We found that the medical income on the 1949 return was \$16,152.76.

Q. Now wait a minute. All right—1949. Now the medical receipts per return? A. Per return.

Q. How much? A. \$16,152.76.

Q. That is net income on the return?

A. That is the total receipts.

Q. That is total medical receipts?

A. From business or profession.

Q. It does not include dividend income or interest income, or anything of that sort? A. No.

Q. May I ask what the net income on that return is?

A. From business or profession net income was \$4,668.18.

Q. In other words, the doctor had expenses of what amount? A. \$11,484.

Q. And these were gross medical receipts received from patients as shown on the returns, is that right? A. That is correct. [398]

Q. All right, continue your answer.

A. Now we checked the totals on the duplicate deposit slips. Adding the totals, we have an actual total of \$16,223.26.

Q. All right. Is that from the deposit slips or the work sheets?

A. That is from the deposit slips.

Q. How much did that amount to?

A. \$16,223.26.

(Testimony of Robert Black.)

Mr. Avakian: Your Honor, in the interest of clarity, I am going to ask the Court's indulgence to request that this matter be clarified, because in using the term "deposit slips" implies that is money that went to the bank. I am sure the witness means——

Mr. Maxwell: Counsel—there is nothing mysterious about it.

Mr. Avakian: But the witness is using not deposit slips, but duplicate deposit slips, which include not only money deposited in the bank, but also amount of cash on deposit.

Mr. Maxwell: Your Honor, I think counsel can testify at some other time.

The Court: I think that can be well brought out in cross-examination but the jury and the Court are entitled to know a bit about the procedure as we go along, so try to keep it as simple as possible.

Mr. Maxwell: That is what I am trying to do, your [399] Honor. I can only ask the witness one question at a time.

The Court: Very well, proceed.

Q. These are not the original deposit slips?

A. They are not. These are duplicates.

Q. And you transcribed those duplicates?

A. Yes.

Q. And they were in the doctor's possession, is that correct? A. Yes sir.

Q. Do those duplicate deposit slips contain memorandum of amounts on deposit? A. Yes.

Q. Did you take that into account in this com-

(Testimony of Robert Black.)

putation here? A. Yes.

Q. Do you have any idea of the amount of the \$16,223.26, do your duplicate deposit slips show any amounts not deposited?

A. I think I can find it.

Q. Please do so.

A. According to the figures I have here, for the year 1949, out of that total of \$16,223.26, there was a total of \$6,002.25 which was not deposited.

Q. That includes this figure, is that right?

A. That is right.

Q. I will write down here, "Not deposited." Now then on these duplicate deposit slips showing \$16,223.26, the medical receipts are \$16,152.17? [400]

A. Yes, the doctor told us his work sheets contained information and the monthly totals of deposit slips. Now we checked on the monthly totals of these deposit slips with the doctor's work sheets and we come up with a different figure in March. He had overstated his March total by 50 cents.

Q. His work sheets showed a total?

A. Yes.

Q. What was the total on his work sheets?

A. \$2,087.50.

Q. For the whole year?

A. His total was \$16,152.17.

Q. The same thing as on the return?

A. That is right.

Q. His medical receipts per return and per monthly work sheets, is that right?

A. That's right.

(Testimony of Robert Black.)

Q. Were the work sheets in the doctor's handwriting, do you know?

A. I don't know at this moment. As I recall, this upper part of the work sheet only had figures that was in long-hand writing.

Q. Were figures in ink or typewritten?

A. I believe they were handwriting, but whether pencil or ink, I don't know.

Q. Now in the \$16,223.26 shown in the duplicate deposit slips, were you able to reconcile the difference between the duplicate [401] deposit slips and work sheets of medical receipts on the return for the year 1949?

A. Yes.

Q. What adjustments did you have to make to this \$16,223.26?

A. Well, we found that, according to our figures, the doctor had overstated the March total by fifty cents and October an understatement of \$71.

Q. You took the overstatement away and added back the understatement, is that right?

A. That is right.

Q. Were there any other adjustments?

A. Those were all the adjustments for that year. I might state at this time that with reference to that figure \$16,223.26, we were using the doctor's totals on the daily deposit slips, and I think subsequently we may have made adjustments to those totals.

Q. Now did you ever come out with \$16,152.76?

A. Yes, subtraction—you have to do it the other way.

(Testimony of Robert Black.)

Q. In other words, we add 50 cents here, which makes \$16,223.76, and subtract \$71?

A. That is right.

Q. Now did you do the same thing for the years 1950, 1951 and 1952? A. Yes, we did.

Q. All right. What was the amount of medical receipts for the [402] year 1950 on the return?

A. 1950 return showed total receipts of \$17,-184.80.

Q. And were you able to reconcile that to the doctor's records with the deposit slips?

A. By using the same totals that he used for his deposit slips, we came to the same figure.

Q. Exactly the same figure?

A. That's right.

Q. The year 1951?

A. He has total receipts on return for 1951 of \$31,419.24.

Q. And were you able to reconcile that?

A. We were. The totals of the duplicate deposit slips was \$31,423.24.

Q. Four dollars over?

A. And according to his work sheet there was a refund to Helen Macy of \$4, which brings the figures in agreement. For the year 1952 we found total of the duplicate deposit slips and the total on the receipt books agreed substantially with the return.

Q. What was the medical receipts on the return?

A. They were \$49,441.49.

Q. What did you find the totals on his duplicate

(Testimony of Robert Black.)

deposit slips and cash receipt book, I believe you said they agreed?

A. That is right, \$49,441.99.

Q. Fifty cents difference?

A. That's right, fifty cents. [403]

Q. Now on the duplicate deposit slips were names of patients shown?

A. Generally they were, yes.

Q. Were they shown in all instances?

A. No, there were some instances — generally about once a month included on the deposit slips or figure a figure which he identified as cash.

Q. He had that figure on the back of the deposit slip as cash? A. Yes.

Q. And of course you included that amount in your computations?

A. Yes. There were also some other deposit slips, or entries on duplicate deposits, for which we could not determine the name of the patient.

Q. How much of the receipts for 1949 of the \$16,223.76, how much of that was unidentified as to patient's name?

A. We were unable to identify a total of \$2,960.75.

Q. Now the receipts on the deposit slips were \$16,223.76. How much of that could you identify as by patient's name?

A. We were not able to identify \$2,960.75.

Q. For 1950 what was the receipt per return?

A. \$17,184.80.

(Testimony of Robert Black.)

Q. How much could you identify by patients' names?

A. We were not able to identify \$2,423.50.

Q. How about the 1951 return of \$31,431.04?

A. We were not able to identify \$12,969.95. [404]

Q. How about 1952, with receipts on the return of \$49,441.49?

A. For that year on the duplicate deposit slips and miscellaneous cash shown in the receipt books and some other items, we have a total of \$2,398.42 we couldn't identify.

Q. Now these figures, \$2,960.75, \$12,969.95 and \$2,398.42 were the only receipts on the return you could not identify as to the course of patient's names, is that correct?

A. That's right. Every other entry on the deposit slips had the name of the person who made the payment.

Q. Now then, Mr. Black, did you make an attempt to determine by specific patients the amounts which would be included in reported receipts on the return as identified by you? Do you follow my question?

A. No, I don't.

Q. Did you make a computation of the income, amounts paid by the various patients, during the years 1949, 1950, 1951, and 1952?

A. Yes, I made computations.

Q. What did you use to make that computation?

A. Well, we used statements of medical receipts and stipulations and for the year 1951 we had a part of a receipt book covering the period between

(Testimony of Robert Black.)

September 26th and the end of the year. We used that and for all of the years 1949 through 1952 we used the entries on the patient cards, according to our transcription. [405]

Q. Did you also use the transcript of the duplicate deposit slips? A. Yes, we used that too.

Q. When you found a payment on the deposits, that would be reported, is that correct?

A. That is right, and for the year 1952 those items in the receipt book which would also be reported for that particular year.

Q. Would that be true of 1951?

A. No, we can't identify the receipt book in the reported income for the year 1951.

Q. For what period did you have receipt books for 1951?

A. September 26th to the end of the year.

Q. You have available, then, a comparison of reported income for individual patients with unidentified receipts; in other words, receipts not deposited? A. Yes, we do in certain cases.

Q. Would you tell me what you did with respect to that computation?

A. First we transcribed all of the information on the duplicate deposit slips and in the 1952 receipt book on three by five cards, put them in order, patient's name and any information we had concerning payment by the patient, date received and reported.

Q. You identified any deposits on duplicate deposit slips? [406]

(Testimony of Robert Black.)

A. Yes. We also included the names of collection agencies of those receipts, whether a Business and Professional Service. Those were inserted on that card file also, so the card file represented all reported income.

Q. The receipts from collection agency was included on the duplicate deposit slips? A. Yes.

Q. You could identify that as having been reported?

A. Yes. Well, I have here matched the information regarding payments to the doctor against this file. If we could find that item in the file, we knew it was reported. If it was not found in the file, we set that up on the schedule as unidentified income.

Q. In other words, amounts received by the doctor not identified as such on the return, is that correct? A. That is right.

Q. Those amounts could then be included in these figures on the return that you were unable to identify, is that correct? A. That is correct.

Q. All right. You have a schedule of that information comparison? A. Yes, I do.

Q. May I have it.

Mr. Maxwell: Your Honor, I think we can stipulate as to this. I ask it be marked as [407] government's exhibit next in order, whatever the next four numbers are. I offer them for identification.

The Court: Do you wish them marked as one exhibit?

Mr. Maxwell: No, your Honor, I would like them marked as four separate exhibits.

(Testimony of Robert Black.)

The Court: The last offers will be marked for identification as Exhibits 127(a), 128(a), 129(a) and 130(a).

Q. Mr. Black, that form you have before you there, can you say generally what it contains, in regard to the figures you have inserted, the form which is 127(a) for identification?

A. It contains the names of approximately all the patients of Dr. Kelley that we could determine. I notice there are a few missing on it but generally contains all the patients.

Q. Do you know how many names it contains, approximately?

A. No, I don't know, I never counted them.

Q. Does 1150 sound like a good estimate?

A. Yes, it does.

Q. Now I wonder if you will tell us what information you have placed upon those schedules?

A. Yes, we first entered the information that we could determine regarding certain payments to Dr. Kelley.

Q. First is the name, is that right?

A. The first thing is the name.

Q. What comes next? [408]

A. There is a column for stipulations.

Q. That is amounts stipulated by the defendant and the government.

A. That is right.

Q. And the next one?

A. The next column is testimony. The next column is patient card; the next column is fees iden-

(Testimony of Robert Black.)

tified on return; the last column is fees not identified on return.

Q. Now will you give us the first part of the information that you have, his name?

A. His name——

Mr. Avakian: These haven't been offered in evidence or shown to us, your Honor. If he is going to testify to the amounts, I think we should have a chance to look at them.

Mr. Maxwell: I have no objection to counsel looking. I might say he might examine them during the noon recess if that would be satisfactory. They do constitute computations made by the witness. His testimony, of course, is the best evidence. If counsel desires to put them in evidence, that is up to him.

Mr. Avakian: May I ask, through the Court, whether counsel intends to offer them in evidence? If not, that might ease the problem.

Mr. Maxwell: Actually, counsel, I hadn't thought about it. Is it your desire that they go into evidence?

Mr. Avakian: I don't know; I haven't [409] seen them, but if these are simply memorandum of computations of the witness in his testimony, I have no objection to going ahead, with the understanding, of course, we can see them and cross-examine. If that is all counsel has in mind, I am agreeable to going ahead.

Mr. Maxwell: They are marked for identification.

(Testimony of Robert Black.)

Q. What is the first name as to which you made comparison? A. Aubrey Allen.

Q. Tell us what you did.

A. The testimony column has \$250.

Q. What year is this you are talking about?

A. This is 1949.

Q. Give us the exhibit number of that.

A. 127(a) for identification.

Q. Now you have \$250 entry in the testimony column? A. That is right.

Q. And what is your next?

A. I have zero in the fees unidentified on return column.

Q. In other words, you were unable to find any payments identified on the card receipts for payment by duplicate deposit slips?

A. For that year for Mr. Allen.

Q. And the last column, unidentified on the return? A. \$150.

Q. How about the patient cards? [410]

A. Didn't have an entry on them in this particular case.

Q. Do you know whether or not there was a patient card?

A. I believe there was for that particular patient. Apparently it agreed with this figure.

Q. In other words, you say that the patient card would be paid \$250, is that right?

A. Well, I can't exactly say that figure, without checking with the records.

Q. Can you do that during the lunch hour and

(Testimony of Robert Black.)

come back and tell us about that? A. Yes.

Q. What is the next name that you have?

A. The next is Esther Ball.

Q. What do you have?

A. Testimony column, \$43; identified column, zero; fees not identified, \$43.

Q. And what about the next name?

A. Mrs. M. Faghan.

Q. What do you have there?

A. Testimony column, \$388; zero in the identified column; fees not identified, \$388.

Q. And the next name?

A. Evelyn Burke. On the patient card column, \$177.50, and the identified column, \$87.50 and the not identified column, balance of \$90. The next is Irene and Louis Chase. [411]

Q. I think we have gone far enough on the blackboard, so go ahead and state to me the other names you have found for each patient.

A. The next is Louis and Irene Chase. Testimony column, \$476.50; patient card column, same amount; identified column, zero; fees not identified, \$476.50. Ann Collette, patient card, \$308 zero identified; not identified, \$308. Next is Dorothy Cooke; patient card, \$115; nothing in the identified column; \$115 not identified. Next is Buddy Cooper; \$40 on the patient card; fees identified nothing; fees not identified, \$40. Next Annette Crooks; \$15 in the stipulated column; zero in the fees identified; \$15 in fees not identified. Next is Virginia Cubberness; stipulated column, \$296. I have \$26.50

(Testimony of Robert Black.)

from the Nevada Industrial Commission; fees identified, \$150, plus the \$26.50 from the Nevada Industrial Commission, a balance of fees not identified, \$146. Next is Richard David; testimony column, \$235. I have memorandum here of patient card \$350; fees identified is \$50; balance fees not identified, \$185. Next is Catherein Doncette. Patient card, \$35; nothing in fees identified; \$35 in fees not identified. Next L. J. Dossey; stipulation column \$15; identified column zero, fees not identified, \$15. Next is Lilly Engblom; testimony column \$5; fees identified, zero; fees not identified, \$5. Next Mrs. Gene Etchegoin; patient card column \$60; fees identified column zero; fees not identified column, \$60. Next Pete Etchegoin; patient [412] card \$10; fees identified column, zero; fees not identified column, \$10. Next Ben Ferrari; stipulated column, \$55; fees identified column, zero; fees not identified, \$55. Next Rena Ferrari; testimony column \$452; fees identified column, \$342; fees not identified column, \$110.

The Court: I think we will take our recess at this time.

(Jury admonished and recess taken at 12:00 noon.

Afternoon Session—April 4, 1956—1:30 p.m.

Defendant present with counsel. Presence of the jury stipulated.

The Court: This perhaps would be a good time to dispose of the matter which the Court took under

advisement. Counsel for the defendant requested the Court, during the course of his examination of the government witnesses Green and Heppner, for an order to direct the production of certain memorandum and notes made by these two witnesses, such memorandum and reports and data being now a part of the file in this case and a part of the government's records. The Court has studied the memorandum presented by the defendant and by the government and apparently has made a much more exhaustive survey of the subject than [413] either counsel. It is the understanding of this Court that none of these memoranda, documents or reports sought by the defendant and requested to be ordered by the court to be produced, were in court at the time either of the two witnesses testified and that none of this date, memoranda or reports were in fact used by either of the witnesses by way of refreshing their memory.

Mr. Avakian: Your Honor, may I state my understanding of the testimony of one of those items. I believe Mr. Green testified, in preparation for the trial, he had reviewed the memorandum.

The Court: That is correct. You may proceed.

ROBERT BLACK

resumed the witness stand on further

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, I believe you were in the middle of giving us your comparison between identification of amounts on the return

(Testimony of Robert Black.)

and the deposit slips and the stipulations you have on certain patient cards. Now if you recall, this first name in 1949, Allen, I believe, and the witness testified he paid \$250 in the year 1949 and the duplicate deposit slip showed you did not identify this amount in the receipts, is that correct?

A. That is right.

Q. So that there was \$250 not identified as to receipts on the return? [414]

A. That is right.

Q. Now there were reported \$16,223.26 receipts on the return, of which you were unable to identify \$2,960.75, is that correct? A. Correct.

Q. I ask you if you checked, during the recess, to find out about the patient card with respect to Mr. or Mrs. Allen? A. I did.

Q. What did you find that your records show in respect to that?

A. I found no record of the patient card as transcribed.

Q. Now can you explain generally what you have done with respect to your comparison there as to patient card in that connection?

A. If I do not have any patient cards on this sheet in all cases, we do have some information which would tell whether or not we do have a record of patient card on the transcript.

Q. And when did you put down the amounts that were on the patient cards, or when did you first make an entry?

A. Well, on this sheet here we only made an

(Testimony of Robert Black.)

entry in the patient card column when we determined the income figure from that source. In other words, there was testimony or stipulations. If it did not involve the patient card, we did not put an entry in the patient card column.

Q. On the other hand, if the patient cards were involved, what did you do?

A. Then we made the entry in the patient card column. [415]

Q. All right. I don't know where you were. You were in 1949? A. Yes.

Q. Will you continue, please, and tell the Court and jury what you found with respect to payments made by various patients during that year?

A. I believe the next name is——

The Court: (Interceding) Gentlemen, I would like to make an observation. This accumulation of names which he has before him is rather voluminous, consists of the result of his check and actions in connection with this matter. Unless there is some obvious reason, I do not see why it couldn't be stipulated in evidence.

Mr. Avakian: May I state our position, your Honor? During the noon recess I took as much look at these as I could. I believe there were some 172 files, some of which contained a number of items and some very few. We certainly do not want to be in the position of stipulating that these things here summarized are correct, at least until we have a chance to examine them. I think it is obvious we can't examine them in a matter of minutes or two

(Testimony of Robert Black.)

or three hours, because it means checking them carefully.

The Court: I suggest that that be subject to your right to check them over.

Mr. Maxwell: Your Honor, I think it is [416] primarily up to the defendant whether he desires to stipulate as to the documents.

Mr. Avakian: Your Honor, I do not think we need any stipulation. I think if the witness testifies he has prepared these on the basis of the evidence that has been presented in court, plus evidence that is available in court for our examination and if we are given a reasonable opportunity in preparation to cross-examine to go over these, I think he could properly offer them in evidence. I wanted to make this clear, your Honor, that they go in on that basis. I think it is going to take us a long time to check this because it is voluminous. We have no knowledge, have not seen them until this morning, and I am sure your Honor appreciates the position we are in and I am only asking that we have enough time as would be necessary. We are willing to work until two o'clock in the morning if necessary.

The Court: Perhaps counsel should have that right.

Mr. Avakian: May it be understood, if counsel does not object, that these exhibits, when received in evidence, may be released to us over night, so we may examine them.

The Court: Any objection, counsel?

Mr. Maxwell: No, your Honor, I can't see any

(Testimony of Robert Black.)

reason against it. I think the government also is going to want access in connection with preparation of final calculation.

The Court: I am wasting more time by trying to shorten this. [417]

Mr. Maxwell: I think probably we can get together and stipulate that they might be offered in evidence and be received. I want to inform the Court of the government's position in this respect, and that is that the documents were finally finished last night and that is the reason defendant's counsel have not seen them earlier. We had not seen them earlier either. It is quite obvious to both the Court and jury that the documents are in part prepared from witnesses who testified a few days ago and stipulations about two days ago and obviously they could not be compiled prior to that time. Now as to the availability of the records from which they were compiled, I do not know, but I suppose counsel for the defendant will stipulate he is in possession of such books and records as are in existence and owned by Dr. Wayne P. Kelley. Since these records were compiled from transcriptions of those records, I assume those are all available, counsel.

Mr. Avakian: If there is something on the exhibits which purports to relate to a patient card which is different from what the patient card shows, we might want to see the work papers or transcriptions to see where the error lies.

The Court: Counsel, if you would just make note

(Testimony of Robert Black.)

of this situation and call it to the Court's attention on that point.

Mr. Maxwell: I would be greatly surprised if in the transcript of thousands of entries there [418] may not be one or two typographical errors of some kind. Another situation I would like to bring to the attention of the Court. I do not know how long the cross-examination of this witness is going to take, but his testimony, if these documents are stipulated in evidence, on direct will probably only last five or fifteen minutes and we have only one further witness, Mr. Calkins, an expert witness, and he has computations to make and I know we will not be able to finish this afternoon, so we may have to ask for a recess.

The Court: I do not think we need to keep this witness all day to go over this and if we can get this in, that will give Mr. Avakian and other counsel more time to start work on them. I assume counsel will have some cross-examination.

Mr. Avakian: Yes, I am prepared for cross-examination on other testimony.

The Court: Then make the offer if you are through, counsel.

Mr. Maxwell: Yes, your Honor. Subject to the understanding with counsel, the government offers in evidence Exhibits 127(a), 128(a), 129(a), and 130(a) for identification.

Mr. Lohse: No objection, subject to the understanding.

The Court: The offers will be received in evi-

(Testimony of Robert Black.)

dence as government's Exhibits 127(a), 128(a), 129(a), and 130(a), with the understanding [419] had concerning the defendant's right to examine and later cross-examine.

Mr. Black, I think we have saved you perhaps a sore throat. I would at this time, then, like to ask you if you have totalled up these amounts on Exhibits 127 to 130 inclusive, for each year? Have you done that, sir?

A. Well, I have had tapes run on most of the columns.

Q. Some columns you have had tapes run on, is that right? A. That is right.

Q. Well, we will see what you have. Put that down. (Writes on blackboard)

A. For the year 1949 we have in the stipulation column a total of \$1350.

Q. 1350, all right, stipulation column.

A. In the testimony column we have a total of \$3141, and the patient card column a total of \$6688.50; in the identified column, \$1117; in the last column, not identified column, a total of \$8843.50.

Q. All right, 1950.

A. I do not have totals for it, except the final column, in 1950.

Q. Maybe we can get those this afternoon or tomorrow.

A. Total in the last column is \$14,804.

Q. And for 1951?

A. In the stipulation column total of \$2,981; testimony column, \$3,956; patient card column, \$15,-

(Testimony of Robert Black.)

247.85; and the identified fees [420] column \$5,559.-04, and the fees not indentified column total of \$13,-430.31.

Q. And 1952?

A. In the stipulated column, total of \$1,666.50; testimony column, \$2,948; patient card column, \$8,-153.28; in the fees identified column, \$5,683.13; in the fees not identified column, \$1,485.50.

Q. Now, Mr. Black, during the course of your investigation, did you have occasion to contact a number of Dr. Kelley's patients?

A. Yes, we did.

Q. And did you contact all of his patients?

A. No, we were not able to contact all of them.

Q. How did you secure the names of these patients you attempted to contact?

A. Well, principally from the patient cards. We had the name and dates on the patient card and checked that against the recent telephone books; also sent out letters and got some information from other sources.

Q. Such as?

A. Hospital records; sometimes the patients would refer us to another patient.

Q. Did you contact a number of patients as to whom you had no record of a patient card?

A. Yes.

Q. How would you contact them? [421]

A. We would have to get that name from some other source, as a patient or hospital record.

(Testimony of Robert Black.)

Q. Do you know approximately how many patients you were able to contact?

Mr. Avakian: I think we ought to have this exactly, if at all.

Mr. Maxwell: If we have it exactly, I will be glad to give it to you.

A. I don't have it exactly.

Q. Can you estimate?

A. No. I think we have some figures. I wouldn't be able to look them up. It would be very difficult.

Q. Would you say it was over two or three hundred?

Mr. Avakian: I object to his leading his witness. The witness has answered.

Mr. Maxwell: I am just trying to get an estimate.

The Court: You may answer.

A. No, I think it would be less than that.

Q. Could you say approximately how many patients the doctor had, to your knowledge, during the years 1949 to 1952?

A. The best source I have for that would be to count the names on one of these lists.

Mr. Maxwell: I believe counsel will probably stipulate there are approximately 1150 names.

Mr. Avakian: I will be glad, after going over it, to [422] stipulate to the exact number then.

Mr. Maxwell: There are 46 pages in the list and 25 names per page, that would make approximately 1150.

Mr. Avakian: There are many pages which are

(Testimony of Robert Black.)

blank here. I just wouldn't know—a few pages that have only one name.

Mr. Maxwell: Each page has 25 names.

Mr. Avakian: Your Honor, I suppose we can work this out after we examine them.

Q. Mr. Black, you have probably heard that there has been some testimony in here with respect to currency owned by the doctor at various and sundry times, particularly prior to the year 1949. Now did you make an investigation with respect to such currency? A. Yes.

Q. Did Dr. Kelley give you any information with respect to the currency? In other words, did he give you any leads as to currency?

A. Yes, he did. He said his father and mother knew about it at one time and his brother and sister.

Q. Did you make an investigation into that?

A. Yes, we did. His father——

Mr. Avakian: Just a moment. Is this going to be hearsay?

Mr. Maxwell: I asked him if he made an investigation. He said yes. [423]

Mr. Avakian: He was answering the question, I don't know what he is going to say.

Q. What did you do?

A. With respect to his father and mother, his father died. In respect to his mother, he said she lived back East and we attempted to have some one from our office interview her there. We found that——

(Testimony of Robert Black.)

Mr. Avakian: Unless this is the witness' own knowledge, we object as being hearsay.

Q. Did Dr. Kelley tell you where his mother was at that time?

Mr. Avakian: May we have the time and place?

Q. Whatever time it was you had the interview.

A. As I recall, the interview we had with Dr. Kelley was February 4th. I believe at that time he said that she was in a hospital back in Connecticut.

Q. Did he say she was mentally incompetent at that time?

A. I do not recall whether he said at that time or whether I heard it some place else.

Q. Any way, what did you find with respect to her condition as a result of your investigation?

A. Well, we received back a letter from his mother's doctor saying she was incompetent to answer the questions.

Q. Now you said that the doctor told you that the currency had been in the custody of his brother and sister?

Mr. Avakian: No, your Honor, there was no such testimony. [424]

Mr. Maxwell: I believe there was such testimony.

Mr. Avakian: No, the witness has not testified that Dr. Kelley said the currency was in the custody of his brother and sister, I am sure of that.

Q. Mr. Black, did you so testify earlier?

A. I believe I did; I meant to.

Mr. Avakian: His testimony was that Dr. Kelley

(Testimony of Robert Black.)

told him his sister knew about it and just now he said his brother and sister knew about it.

Q. What was the testimony?

A. Well, during the first conversation with Dr. Kelley——

Q. What date was that?

A. That was November 6th—he told us that he had a loan on his Ford and the reason for that was his brother and sister had custody of his currency.

Q. Now did you make an investigation with respect to Dr. Kelley's statement to you that his brother and sister had custody of his currency?

A. Yes, I did.

Q. What did you find in your investigation?

A. Well——

Mr. Maxwell: I will withdraw the question.

Q. What did you do?

A. We again wrote letters to our office to interview his brother [425] and sister and received a reply——

Mr. Avakian: I object to the contents of the reply. His brother and sister testified here. Anything else is hearsay.

Mr. Maxwell: I think his brother and sister so testified, yes, that they had no custody of his currency.

Q. Now did you make any additional investigation with reference to Dr. Kelley's alleged currency?

A. We checked immediate sources for financial

(Testimony of Robert Black.)

statements from his bank and loans. We did not find any reference to financial statements for the doctor for the period prior to 1946.

Q. Do you recall whether or not the doctor ever made a statement to you with respect to financial statements at any time?

A. I don't recall that he did.

Q. Did you do anything else in connection with the investigation of the doctor's currency?

A. Well, we again tried to contact one of his former wives he was married to during the former years. Again we wrote letters and received a reply——

Mr. Avakian: Just a moment—we object to the contents of the reply. One of the former wives is under subpoena and we have her to testify. I don't think we should have hearsay.

Mr. Maxwell: Your Honor, please, counsel has insisted that the government furnish evidence in this trial as to investigations and cash on hand. This witness is not testifying as to [426] the truth or falsity of the replies given, but merely the investigation that was made and that he received replies which were negative.

Mr. Avakian: We object to that statement as to what the replies contained. I ask that counsel be admonished from making such comments.

The Court: That portion of counsel's statement that the replies were negative will be stricken and the jury will be advised not to consider that as part of the evidence. There is no other evidence here

(Testimony of Robert Black.)

as to what the replies were. I believe, counsel, that if your question elicits only such information as you have recited, you are on safe ground. If it goes any further, you are not.

Mr. Maxwell: That is all I intend to elicit, your Honor.

Mr. Avakian: We do not object to the financial statement, but we do object to this witness giving, even by implication what testimony would be offered by witnesses under subpoena.

The Court: He hadn't.

Mr. Avakian: He was about to, your Honor.

The Court: You can object when he starts.

Mr. Maxwell: We do not intend to start, if the Court please. [427]

Mr. Avakian: Sometimes we have to object, because it is too late when he started.

Q. I believe, Mr. Black, you were saying that you sent inquiry with respect to former wives?

A. Yes, sir.

Q. And you were about to say that you received some replies. I wonder if you could say what the nature of those replies were?

Mr. Avakian: Objected to as calling for hearsay; no showing it is unavailable by witnesses.

Mr. Maxwell: What witness are you referring to?

Mr. Avakian: Well, you have called by name one of the former wives and you can put her on the witness stand. Let us not have hearsay through showing as to what she would say. Put her on the stand so I can cross examine.

(Testimony of Robert Black.)

Mr. Maxwell: I don't intend to bring in hearsay. I do intend to show the investigation made with respect to leads given by Dr. Kelley.

Mr. Avakian: The fact he made inquiry shows investigation was made. As to what that produced, that is something to be developed by admissible evidence.

The Court: I think, counsel, you are satisfied of the leads?

Mr. Avakian: I take it they made a start. I do not think they proved anything, except they made an investigation.

The Court: Apparently you are satisfied that an [428] attempt was made of the leads?

Mr. Avakian: I am satisfied they made some effort, your Honor.

The Court: I do not think, counsel, the contents of the report should be received at this time. It does appear to be hearsay.

Mr. Maxwell: Yes, your Honor, and I will not try to get the contents. I just want to know if he received any additional information with respect to cash on hand or currency as a result of his inquiry.

Mr. Avakian: That is a left-handed way of getting in the same thing.

Mr. Maxwell: I think that is perfectly proper to go before the jury by this witness.

The Court: You make a fresh start. Reframe your question.

Q. Did your inquiry with respect to the former wives, Mr. Black, develop any additional or any information with respect to cash on hand?

(Testimony of Robert Black.)

Mr. Avakian: Objected to as calling indirectly, and by conclusion, for contents of some communication; apparently hearsay.

The Court: Answer yes or no.

A. Yes.

Mr. Maxwell: Now I don't exactly know what the answer [429] was to the question that was objected to.

Mr. Avakian: The answer was yes, your Honor. Your Honor instructed him to answer yes or no.

The Court: He answered yes to the question if he was given additional information.

Q. Did it give you additional information, Mr. Black, that there was or was not any such currency on hand?

Mr. Avakian: Objected to——

The Court: That question has been answered yes.

Q. It has been answered yes—is that the way you understand it, Mr. Black? Perhaps we can reask the question and we will undoubtedly get an objection again; perhaps we can make it a little clearer. Mr. Black, did you receive reply to any inquiry with respect to the doctor's former wives, is that right? A. Yes, I did.

Q. Did that reply indicate information that the doctor did have currency on hand in any substantial amount?

Mr. Avakian: Objected to as calling for the witness' conclusion as to the contents of a letter. Hearsay. We object to it.

The Court: Objection sustained.

(Testimony of Robert Black.)

Q. Did the reply contain information as to the existence of currency?

Mr. Avakian: Same objection. Your Honor, to the extent it may relate to whether he got additional information, we [430] will not object. Any attempt to characterize the nature of the information calls for hearsay.

Mr. Maxwell: Your Honor, I think the reply, as to whether it did or did not contain information as to the existence of currency; in other words, whether the reply was affirmative that currency did exist, or negative that currency did not exist, would be admissible, not to prove whether or not currency did or did not exist, but whether, as a lead and in order to establish a lead, I think we have to have the witness testify to what leads he received. Now, if counsel does not want to know what leads he received—I do not see any way going into it any other way.

The Court: That is not being offered, as I take it, for any fundamental value at the moment. The offer is for the purpose of showing what this agent did.

Mr. Avakian: What he did was to write to the former wife. As to what she said, that is what counsel is trying to get in, what she said. That is hearsay until she comes to the witness stand.

The Court: Let us ask if he received any further leads from the contents and let it go.

Q. Very well. Did you receive any further leads from the contents of the correspondence?

(Testimony of Robert Black.)

A. No. [431]

Q. Now in connection with your investigation into this currency, what else did you do, Mr. Black, if you can recall?

A. I recall checking the court records on his former divorce to see if they had any connections to his financial status at the time of the divorce.

Q. Did you examine his early income tax returns? A. I personally did not.

Q. Did Mr. Green do that? A. Yes, he did.

Q. As I recall, you testified Dr. Kelley stated to you that he had a mortgage on his Ford automobile in 1946? A. So he said.

Q. Did you make investigation to find a record of that mortgage?

A. Yes, I did. I checked with the company that sold him the automobile. I found he paid cash for it within a short time. I also checked the title mortgage file. I didn't find a record of a mortgage of the Ford. However, there was a record of another title mortgage.

Q. Was that on an automobile?

A. As I recall, it was on a Mercury.

Q. Mr. Black, was there some adjustments which should be made on these figures we have on the board for 1949, 1950, 1951 and 1952, with respect to not identified on returns?

A. Yes, there is. There should be an adjustment to a number of [432] columns there.

Q. Can you tell me what it is?

A. I do not know if I mentioned it. In addition

(Testimony of Robert Black.)

to the testimony, stipulations and patient cards, we have another source of income which would be receipt books for 1951, and we found that during the last few months of 1951 there was income of \$1,695, which was not included in those figures which I have already given and which——

Q. Will you break that down?

A. We will eliminate from the figures on receipt book income, which we had picked up in column stipulation, testimony and patient cards, and we also eliminate any income indicated by the receipt book for the year 1951, which was in identified receipts by deposit slips.

Q. And does that result in adjustment of figures on the board? Should there be any change?

A. Yes, for the year 1951 it would add to the not identified on return column the total of \$1695.

Q. That should be added on to this 13 thousand dollars? A. That's right.

Q. Anything else?

A. We made adjustments as you have there for unidentified on return and also made some other deductions for income which the doctor reported, which perhaps should not have been reported.

Q. How do you mean that? Explain. [433]

A. There was some income he received in the year 1948 which he actually reported in 1949. We deducted that figure and did the same thing there each year.

Q. In other words, he would receive income at the end of 1948 and be reported in 1949?

(Testimony of Robert Black.)

A. That's right.

Q. And he would receive income in 1949 which he would report in 1950? A. That is right.

Q. So you then shoved back in 1949 and shoved 1948 income out of 1949? A. Yes.

Q. You made that adjustment then for each year, I take it? A. Yes.

Q. Please tell me what that adjustment was.

A. The year-end adjustments, we have a deduction for the year 1949 of \$86.50.

Q. In other words, 1949, \$86.50. All right, 1949 year-end figure should be \$89 less, you say?

A. \$86.50.

Q. The year 1950?

A. For that particular item there was no adjustment for 1950.

Q. 1951? A. \$32.50.

Q. More or less? [434] A. Less.

Q. All right, 1952? A. \$600.50.

Q. Less?

A. Less. Giving you those figures, that is the total deduction. In other words, we did not date back to the previous year.

Q. You did not date back?

A. That does not include any amount set back.

Q. In other words, 1950, received late in 1950, which was reported in 1951, you took it out of 1951 receipts, but didn't put it back in 1950 receipts, is that right?

A. Yes, that is true. Now, there are some other adjustments. First, the figure I mentioned previ-

(Testimony of Robert Black.)

ously, item of \$750, he received as repay from George McKaig.

Q. Received during the year 1952?

A. 1952. He had reported that with his medical receipts, so we deducted that.

Q. What else?

A. During the year 1950 he overstated one of the totals to the extent of \$180.

Q. One of the totals of what, Mr. Black?

A. That would be one of the totals in the duplicate deposit slips. He had it entered \$425. According to our figures, it should have been \$245. Also on his receipts on the collection [435] pages, there were some items which he reported as he received them from the patient, and also reported the income some time later when he received the balance in the check from the patient. That amounted to \$3 in 1949, 1950 a total of \$10, total of \$101.05 for the year 1952.

Q. Those are the full adjustments?

A. Those are the full adjustments.

Q. Do you have any idea of the number of items, patient names, which you made in the years 1949 to 1952?

A. That again would be a guess. We just finished this list.

Mr. Avakian: That is the same item we were going to stipulate on after we counted them?

Mr. Maxwell: No.

Mr. Avakian: We will stipulate, after counting, anything on the schedules.

Mr. Maxwell: You may inquire.

(Testimony of Robert Black.)

Cross Examination

Q. (By Mr. Avakian): I want to make sure I understand these year-end adjustments that you made, Mr. Black. You said there was \$86.50 for 1949, for example?

A. Yes. \$86.50 was four different items.

Q. Without giving me the items, would you explain what this adjustment was?

A. Yes. They are items which, according to the information we were able to collect, he actually received in 1948 but appeared [436] in 1949; it was included in 1949 income tax.

Q. There was no adjustment on that account in 1950?

A. No deduction.

Q. In other words, in 1950 he didn't report any item which he had received in 1949?

A. None we were able to determine.

Q. Do you have Exhibit 127 before you? That is the 1949 schedule.

A. Yes.

Q. My notes indicate that the very first item which you read and which Mr. Maxwell wrote on the board at the time, was Aubrey Allen, \$250, is that right?

A. That is right.

Q. And you showed that as to the \$250, according to the testimony, as having been paid in 1949, is that right?

A. That is the way I have it.

Q. And you show another column, fees identified on returns, was zero?

A. That's right.

Q. And then you put the full \$250 in fees not identified on returns, is that correct?

A. That is right.

(Testimony of Robert Black.)

Q. As to the testimony, do you refer to testimony which was given with regard to the check stub dated December 28, 1949 for \$250, which is the item in Exhibit 95? [437]

A. As I recall, this is on testimony of Mr. Allen. There were no amounts on the card. I was able to get these particular figures only from Mr. Calkins, who had seen the exhibit just prior to the time the witness brought it into court.

Q. The exhibit is before you. Mr. Allen testified in person, you recall that, don't you? A. Yes.

Q. And the only document he presented on this \$250 item was that check stub, was it not?

A. I don't recall every detail of his testimony.

Q. At this time are you able to tell me, of your knowledge, the information which led you to classify that \$250 as a non-identified item?

A. Yes, we were not able to identify it on the duplicate deposit slips for the year 1949.

Q. And I take it you did not identify it for 1950 either, because you said you made no adjustment on account of items received? A. No.

Q. You found no record in Dr. Kelley's records anywhere of the receipt of that money, is that correct? A. Yes.

Mr. Maxwell: Do you want to offer this in evidence?

Mr. Avakian: I would like to show it to the witness.

Mr. Maxwell: I object to showing the witness any document [438] not properly identified and not in evidence.

(Testimony of Robert Black.)

Mr. Avakian: It will be identified, your Honor.

Q. Mr. Black, I am going to show you what purports to be a duplicate receipt book, and ask you if that is one of the duplicate receipt books which the doctor and Mrs. Kelley turned over to you and Mr. Green during the course of your investigation?

A. It appears to be. May I refer to my notes?

Q. Yes, I would like to have you verify that for sure. Mr. Lohse called my attention to the fact that this is actually a duplicate deposit book, is that correct?

A. Duplicate deposit book.

Mr. Maxwell: I ask the document be marked for identification.

Mr. Avakian: Before that, may I make the statement I believe the witness, when he examines it, will testify he has made a transcript of this.

The Court: I think it should be marked.

Mr. Avakian: The trouble is we need it all through the trial. May it be returned in our custody during the course of the trial, rather than the clerk's?

Mr. Maxwell: I strongly object.

The Court: Let us mark it then, Mr. Clerk, at this time so you both can use it. This is defendant's Exhibit E and put a number after it, showing it is for identification, so it will be E-1. [439]

Mr. Avakian: For the record, may it be noted on the cover of that duplicate deposit book there is a notation, "January 1948 to June 1950."

Q. Mr. Black, I will call your attention to Exhibit 123, which Mr. Green testified was a receipt obtained by yourself and Mr. Green from Dr.

(Testimony of Robert Black.)

Kelley when you returned certain records, and ask you if you find on that typewritten receipt a reference to a duplicate bank deposit book for January 1948 to June 1950. A. Yes, I do.

Q. And this duplicate deposit book which I have shown you, Exhibit E-1 for identification, is the book which you had and which you returned to Dr. Kelley on December 17, 1953, isn't it?

A. Yes.

Q. Now, calling your attention to the page in this book which I am now opening for you, do you find a reference there in January, 1950, under the column of cash to an item of Allen, \$250?

A. Yes.

Q. And by referring to the next page, do you find that the total of that check, and the various checks listed with it, \$344, is included in the January receipts?

A. It is included in the figure 912.

Q. And Mr. Black, now that I have called this to your attention, isn't it true that this \$250 Allen item, which was the first item on Exhibit 127, was included in Dr. Kelley's income tax return [440] as a part of the receipts in January of 1950?

A. That item was.

Q. And the check stub is dated December 28th, is it not? A. That is true.

Q. You missed the fact, then, that this was a year-end check which was included in next year's income, isn't that correct?

A. Yes. As I said before, we didn't see that check or stub until just now.

(Testimony of Robert Black.)

Q. But in working over the duplicate bank deposit book, you didn't put that item in the right place and use it in the right way?

A. No, that should have been an identified item.

Q. I haven't time to go through others. We will defer that until later, so I am not questioning you further regarding these three exhibits, Mr. Black. I believe you testified that you received your assignment on the Kelley matter on September 22, 1953, is that correct? A. Yes.

Q. How do you remember that date?

A. I looked that up on the assignment.

Q. Did you know at that time that Revenue Agent Green was working on the matter?

A. Not until I got the assignment.

Q. Did you almost immediately find out who the Revenue agent was? [441] A. Yes.

Q. Did you talk to him then?

A. I talked to him within the next, I don't know, within the next couple of weeks.

Q. When you talked to him within the next couple of weeks, did you discuss any procedure as to the manner in which you and he were going to discuss this investigation?

A. No, I don't recall discussing the procedure at all.

Q. Was there any discussion with regard to whether he was going to go ahead on the work?

A. Yes, I believe we did come to that conclusion, we decided Mr. Green was to continue with his audit.

Q. And then was it understood that he was to

(Testimony of Robert Black.)

go out and get patient cards and start working on them? A. I understand he did that.

Q. Was that part of your discussion with him?

A. No.

Q. He did that on his own, is that right?

A. Yes.

Q. You are a Special Agent for the Internal Revenue? A. That is right.

Q. Does a Special Agent have a particular type of work he is supposed to do?

A. Well, yes, we work principally on fraud cases.

Q. And in the conduct of an investigation, do you, as Special [442] Agent of the Internal Revenue, have any joint division of work that you try to follow?

Mr. Maxwell: We object to this line of questioning as immaterial.

The Court: The witness may answer. Objection overruled.

A. Well, theoretically we do. As a matter of fact, I think we work everything together.

Q. Sort of a hand in hand proposition, is it?

A. Yes.

Q. You testified, Mr. Black, that you had a conference with Mr. Green, Mr. Lohse, Mr. Lyon and myself, and it was stipulated the date of that was June 9, 1954. Do you recall that conference?

A. Yes, I do.

Q. Do you recall the matters which were discussed? A. I recall some matters, yes.

(Testimony of Robert Black.)

Q. Did you make a memorandum of what was discussed then?

Mr. Maxwell: Objected to as immaterial.

The Court: Objection overruled.

A. Yes, I did.

Q. Have you referred to that memorandum to refresh your recollection in preparation for your testimony here? A. Yes, briefly.

Q. About how long ago did you do that? [443]

A. Oh, sometime within the last few weeks.

Q. Do you recall that shortly after that conference I wrote you a letter, in which I set forth, item by item, my understanding of the things which were discussed?

A. Yes, I recall the letter, yes.

Q. Do you have that letter?

A. Not with me, not here.

Q. You didn't answer that letter, did you?

A. I don't recall, but I believe I answered every letter I got from you.

Q. Do you recall whether there was anything stated in my letter with regard to the items discussed, whether the record was incomplete?

A. What do you mean—whether or not you answered every question that we asked?

Q. Did I set forth in my letter all of the items which were discussed and the items which were to be a subject of further information?

A. I wouldn't be able to say right at the moment whether you mentioned every subject. I know you did mention several subjects.

(Testimony of Robert Black.)

Q. Mr. Black, you testified on your direct examination, that at this conference on June 9th, you asked us for more information regarding cash on hand and you never got any. On what do you base your testimony that that matter of cash on hand was discussed at that time? [444]

A. Just a recollection.

Q. Do you have any notes which show that?

A. Well, I don't have my notes right here at the present time.

Q. Would you refer to your notes and would you refer to the letter which I wrote you, setting forth my understanding of the items discussed, and will you look to see whether you wrote me in answer to that letter and see if you can get all that by tomorrow morning?

Mr. Maxwell: Your Honor, we object to that.

Mr. Avakian: I am entitled to cross examine on this statement, which I think is a damaging statement made by the witness.

Mr. Maxwell: You are entitled to cross examine on the offer. To go and do a lot of research is another question entirely.

The Court: It seems to me the purpose of the cross examination is to determine the credibility of the witness. You can do that by cross examining the witness and not by bringing in everything that might concern it.

Mr. Avakian: When the matter was raised on direct examination, a statement was made that we failed to produce certain information that was re-

(Testimony of Robert Black.)

quested. I would like to make a demand at this time for the production by the government of the letter which I wrote to Mr. Black on June 14, 1954. I appreciate that [445] they can not produce it this moment, but I think it is reasonable, if there was a communication which described the information, the letter itself should be produced here. I can produce my carbon copy of it, but I think it is important to show he got the letter.

The Court: The demand will be refused.

Mr. Brown: Your Honor, please, so there will be no question tomorrow, this witness is not being directed to do the things Mr. Avakian asked him to do, is that correct?

The Court: That is the Court's order.

Mr. Avakian: Your Honor, please, may I approach the bench with counsel?

(Conference at bench between Court and counsel.)

Mr. Avakian: I will ask, your Honor, that the carbon copy of my letter, dated June 14, 1954, purporting to be letter from me to Mr. Black, be marked for identification.

The Court: It will be marked Exhibit F-1 for identification.

Q. Mr. Black, I will ask you to read that letter, carbon copy, and see whether it refreshes your recollection or not as to whether you received that letter from me, the original of that?

A. I remember receiving the letter, yes, sir.

(Testimony of Robert Black.)

Q. And does the reading of that letter refresh your recollection as to the items that were discussed? A. Yes. [446]

Q. And isn't it true, Mr. Black, that there was no discussion at that conference about the item of cash on hand?

A. Reading over this, I see no reference to that particular subject.

Q. Isn't it possible, Mr. Black, in testifying that that item was discussed at that conference on June 9th, you may have been confused with items which may have been discussed at some other conference?

A. I doubt it, but there is always a possibility that it could have occurred at some other conference, yes.

Q. Do you recall that you testified that on February 4, 1954, there was a conference which was stenographically transcribed, attended by Mr. Green and yourself, Mr. Lohse and Dr. Kelley and the stenographer? A. Correct.

Q. And your testimony on that matter was based on your memory, was it? A. Yes.

Q. You stated on your direct examination that at that conference Dr. Kelley said that his sister knew of the currency in Hubbardsville?

A. Yes.

Q. And is it still your testimony that Dr. Kelley said that at that meeting on February 4th?

A. Yes. [447]

Q. Are you quite positive on that, without having to refresh your recollection?

(Testimony of Robert Black.)

Mr. Maxwell: Counsel has a copy of that statement.

Mr. Avakian: I want to be fair to the witness. If he would like to look at it, I would be happy to have you produce it. If he is sure, wants to testify without it, that is all right.

Mr. Brown: He has answered the question twice.

The Court: Unless you desire to impeach, I think he has answered the question.

Q. Let me ask you this, Mr. Black, isn't it true that what Dr. Kelley said about his sister at that time was this, that after you asked him if anybody else, other than his mother and father knew about this currency, his answer was, "Unless my sister knew about it," and if you like, I will show you the statement. Do you have it here?

Mr. Brown: This is the copy.

A. Do you want me to answer that question now?

Q. Would you look at the statement first?

A. As I recall, there were two references to sister in that statement, one as you said, also another reference to the sister under which he said she knew.

Q. I will call your attention to page 8 first and ask you, after you have looked at that page, if it is not true that you asked the doctor if any other person was aware of the currency other [448] than his father and mother and his answer was, "Yes, my sister knew about it."

Mr. Maxwell: If this is an attempt to impeach the witness, no proper foundation has been laid.

(Testimony of Robert Black.)

Mr. Avakian: It isn't impeachment, it is testing his credibility.

The Court: I think he may refresh his memory.

A. May I look over this?

(Jury admonished and afternoon recess taken at 3:00 o'clock.)

3:15 P. M.

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand on further

Cross Examination

Q. (By Mr. Avakian): Mr. Black, have you now examined the entire statement?

A. Just partially, not the entire statement.

Q. Did you find any other statement?

A. Yes, on page 8, you refer to letter here, says, "Unless my sister knew it," refers to cash. On page 12 the question was, "You say your father and mother had no occasion to count it or check it"; the answer that he gives to that: "I don't know of any reason why they should, my sister knew about it."

Q. So on one question he said, "unless" and another he said, "My sister knew about it"? [449]

A. That is correct.

Q. Then you testified Dr. Kelley said the money had been in the custody of his sister. Will you look on page 8 and see if you asked him that question and tell us what his answer was?

(Testimony of Robert Black.)

Mr. Maxwell: I don't believe the witness' testimony in respect to custody was in connection with the conference on February 4, 1954.

Mr. Avakian: Since I was not at any other conferences, I don't know where it was. Let me reframe the question.

Q. At that February 4th conference, did you ask Dr. Kelley if the money had ever been in the custody of his sister? A. Yes.

Q. And what was his answer?

A. He said no, she wasn't at home all of the time, "My sister was away at college a good part of the time."

Q. When you asked if the money was in his sister's custody, do you recall now he said no?

Mr. Maxwell: Object to that; the answer was just read.

The Court: Objection sustained.

Mr. Avakian: I will withdraw the question, your Honor.

Q. Mr. Black, since at the moment at least we have only my carbon copy of this letter of June 14th, I am going to get close to you. We will both try to keep our voices up. By reference to this carbon copy again, Exhibit F-1 for identification, at that conference on June 9th, did you ask that we, as Dr. Kelley's representatives, [450] make an analysis of the business expenses and check the records and furnish that to you?

A. I believe I did.

(Testimony of Robert Black.)

Q. Was that done? Did Mr. Lyon make such analysis and furnish it to you?

A. Of the expenses, yes, he did.

Q. And then did you ask that the work sheet attached to the taxpayer's return, copies of their returns, be made available to you?

A. That is right.

Q. Was that done? A. Yes.

Q. Did you ask for bank statements and cancelled checks for 1946 and 1947 be made available?

A. I did.

Q. Was that done? A. Yes.

Q. Did you ask that we prepare a recital of checks any person had for each year from 1946 to 1952 inclusive? A. Yes.

Q. Was that done? A. That was done.

Q. Did you ask that we prepare and turn over to you a schedule of insurance and endowment policies, showing dates, amounts, annual premiums and benefits received each year? [451]

A. We asked for that.

Q. Was that done?

A. I don't think all of that was done, but I think he did furnish as much as he could.

Q. Mr. Lyon worked up all of that and I believe has turned it over to you?

A. He worked on the figures, yes.

Q. And I stated in my letter the policies would be available to you, is that right?

A. That is what your letter states, yes.

Q. And you asked that we prepare and turn

(Testimony of Robert Black.)

over to you schedule showing the date the airplane purchases were made? A. Yes.

Q. Was that prepared and turned over to you?

A. Yes, I believe it was.

Q. Did you ask, on the June 9, 1954, conference, that we give you information regarding stocks owned by Dr. Kelley in the Federal Gas & Water Company? A. Yes, we did.

Q. Did I furnish you that information in this letter of June 14th?

A. Yes, you stated the information which you received from Dr. Kelley.

Q. Did you ask at that conference for us to let you know whether or not Dr. Kelley had engaged in private medical practice [452] while serving in the army? A. Yes.

Q. Did I give you that information in this letter? A. Yes.

Q. Did you ask us to try to get information to you, regarding the amount of pending deposit in account No. 7923 at the National Bank of Hamilton in Hamilton, New York?

A. I don't recall whether that question was at the conference or during telephone conversation between myself and Mr. Avakian shortly after the conference. It was on one of those two occasions.

Q. Did my letter of June 14th set forth what we understood Dr. Kelley's impression to be regarding that account and state Mr. Lyon would try to develop further details for you?

A. That is correct.

(Testimony of Robert Black.)

Q. Was that done? A. Yes, that was done.

Q. And at that date did you raise the question of whether Dr. Kelley's patient cards would be made available again? A. Yes.

Q. Did I state in my letter of June 14th I would like to defer that matter until we had made a full analysis of that, and if we did turn them over to you, we wanted to have some understanding which would avoid injury to Dr. Kelley's patients, due to large scale circularizing of his patients? [453]

A. Yes.

Q. And at that conference did you ask whether we would be willing to have Dr. Kelley sign the typewritten transcription of the question-answer statement which was taken February 4, 1954, with he and Mr. Lohse? A. Yes.

Q. And in my letter did I state we would like to defer that until the accounting work had been completed by Mr. Lyon? A. Yes.

Q. Do you recall some months later, after you had been transferred back to San Francisco, I talked to you on the telephone and asked you whether we should make arrangements to get together to have Dr. Kelley sign the statement?

A. I recall a telephone call from you in San Francisco. I don't recall that we made any arrangements to get together.

Q. That is right. I am just asking if you recall the conversation in which I asked you whether we should make arrangements.

A. That I do not recall at the moment.

(Testimony of Robert Black.)

Q. You recall the matter was discussed in some form or another?

A. As I say, I don't recall whether you suggested we get together or not. The only thing I remember at the moment was I had been transferred to San Francisco. I can't tell you any more about that conversation right at the moment.

Q. Do you recall, Mr. Black, that I stated to you——

Mr. Maxwell: That has been asked and answered, I believe. [454]

The Court: He can't recall any more of that conversation.

Mr. Avakian: I would like to refresh him on it, your Honor.

Q. Do you recall I stated to you, since you and I were both in San Francisco and Dr. Kelley was in Nevada, that it might take some time to try to arrange for all three of us to be in one place at the same time and you answered, "Well, send your report on" and it really wasn't too important any more whether he signed or not.

A. I really don't recall the first part of that.

Q. Do you recall the last part?

A. I believe I did tell you I sent my report in.

Q. Do you recall, Mr. Black, anything else that you asked us to provide at that conference on June 9, 1954 in Reno, other than the items which we have just mentioned?

A. Well, as I said before, I was under the impression we had asked for additional details regard-

(Testimony of Robert Black.)

ing cash on hand. Without referring to my own notes on it, against your letter, I would say it is possible that that particular request was made since the letter came.

Mr. Avakian: May I ask permission, at the convenience of the clerk, some time or other a copy be made, at our expense, of Exhibit F(1) for identification, for our file? [455]

The Court: The Court will direct a copy be made for Mr. Avakian.

Mr. Maxwell: May I, at this time, ask that copy of the statement be marked for identification, which was used to refresh the witness' recollection on the questions?

Mr. Avakian: We again need these documents during the trial. May I suggest that the original typewritten copy, which I am sure Mr. Maxwell has, be marked for identification if he desires to have it done?

Mr. Maxwell: I would like to have the document marked used to refresh the witness' recollection.

The Court: It may be marked for identification.

That will be defendant's G-1 for identification.

Q. You testified that your recollection was that at this conference on February 4, 1954, which was stenographically transcribed, Dr. Kelley told you that all of his bank accounts had been listed on the net worth statements which are in evidence here as Exhibit 121. Did I understand your testimony correctly in that record? Is that your testi-

(Testimony of Robert Black.)

mony? A. Yes.

Q. I will ask you to look at Exhibit G-1 and tell me what Dr. Kelley's words actually were?

Mr. Maxwell: I believe that will be reading from a document not in evidence.

Q. Does that refresh your recollection as to what Dr. Kelley [456] told you?

A. It says here, "I am almost positive that I listed on the net worth statement. Remember that is to the best of my memory."

Q. In all these conferences, Mr. Black, you were asking Dr. Kelley questions, did you give him a list of items you wanted to question him about, so he could try to gather the information, or did you just call him in and start putting the questions to him?

A. We didn't give him a list of questions.

Q. The other conversations with him were not stenographically transcribed, is that correct?

A. That is correct.

Q. In all of these conversations, when you say he said this or that, isn't it true he was testifying, or stating to you at that time, that he thought it was this way, or to the best of his memory it was that way?

A. I believe that if he used that expression, I would have that in my notes.

Q. From your recollection you don't remember that he had said this, during the questioning, to the best of his memory they were all listed, you don't recall about that, do you?

(Testimony of Robert Black.)

A. There may be some other questions here, I don't know whether there is or not.

Q. Possibly there is. We will not take the time to look at it [457] now, but you can look for it later on. I am sure your counsel will give you the original. You also testified that in February, 1954, Dr. Kelley told you that he maintained the medical records himself and took them home. Do you recall, Mr. Black, in your various discussions with Dr. Kelley, whether he told you that at one period he followed the practice of keeping the medical records at home because he didn't have a secretary at the office, and other periods, when he had a secretary at the office, some of the work was done there?

A. I don't recall that. As I recall, he said that the records were kept at the office except for filing and they were taken home for a period of a week or two.

Q. What did Dr. Kelley tell you at that conference, if you can remember, as to who prepared the tax returns?

A. This was in February, 1954?

Q. Yes.

A. He said he and his wife prepared the returns and prepared them from deposit slips and work sheets.

Q. He also said, did he not, in connection with that answer, that Mrs. Kelley did 99 per cent of the work?

A. Yes, he did. He said Mrs. Kelley did most of the work, 99 per cent of the work on the returns. I believe he also said—I don't know whether referring to returns or deposit slips—but he said that

(Testimony of Robert Black.)

he checked the figures.

Q. And he told you, did he not, in these various conferences [458] you had with him, that the reason why certain assets were carried in the names of his brother and sister and mother until 1950 was that he was having financial difficulties with his first wife?

A. That was brought out in one of these conversations.

Q. He told you that right from the beginning, didn't he? A. I believe he did.

Q. And isn't it a fact that you found, in your investigation, that in 1950, after he had reached a final settlement of his financial difficulties with his first wife, that these various assets, which had been carried up to that time in the name of his brother and sister and mother, were transferred in his own name?

Mr. Maxwell: Objected to as hearsay.

The Court: If the witness knows if they were, it is not hearsay. You may answer.

A. The amounts were transferred into Dr. Kelley's name, I am not sure in 1950 or possibly 1951.

Mr. Maxwell: I am going to ask that be stricken as hearsay.

Mr. Avakian: It is in evidence.

Mr. Maxwell: The quitclaim deed can speak for itself. This witness' testimony is precisely the same thing counsel objected to on direct examination.

The Court: The deed speaks for itself and is in evidence. [459]

Q. I will show you plaintiff's Exhibit 59, which

(Testimony of Robert Black.)

is a certified copy of a quitclaim deed from Winfield O. Kelley and Cora R. Kelley to Wayne P. and Lois Kays Kelley, shown recorded on April 17, 1950, and I will ask you if you can tell us whether that represents the deed on Dr. Kelley's house?

Mr. Maxwell: It has been read in evidence and read to the jury.

Q. Did you examine fully that particular document, or the original, on file in the recorder's office, in connection with your investigation? A. Yes.

Q. Are you satisfied that is the deed on Dr. and Mrs. Kelley's house? A. Yes.

Q. Did you also make an investigation as to what happened to the bank accounts that were carried in the names of Dr. Kelley's sister and brother and mother? A. We did, yes.

Q. And did your investigation show to you that in 1950 those funds were transferred into Dr. Kelley's name?

A. Without having those bank accounts, I couldn't give you the date. I would say approximately 1950 and I am not sure about the account in Phyllis Kelley's name in Reno, whether that was closed in 1950 or 1952. [460]

Q. I think the records are here. I won't take time to look them up now. And, incidentally, there has been evidence here of Dr. Kelley depositing 55 thousand dollars in currency with a broker to purchase stock in June of 1950. Did you hear that testimony? A. Yes.

Q. You knew of that during the course of your

(Testimony of Robert Black.)

investigation, did you not? A. Yes.

Q. Did you also make an investigation to determine the date on which the action, which Dr. Kelley's first wife had filed against him in Nevada, was finally disposed and settled?

A. Again we would have those records in the files, yes.

Q. Isn't it true, Mr. Black, that it was shortly after that litigation was settled that the 55 thousand dollars in currency was deposited with the broker for stock? A. I can't say the date.

Q. I will show you plaintiff's Exhibit 125, Satisfaction of Judgment, showing it was filed May 16, 1950. Did you examine that document in the course of your investigation?

A. I have seen this before, yes.

Q. And you know, do you not, it was in June, 1950 the 55 thousand dollars was deposited with the broker in currency?

Mr. Maxwell: Objected to as calling for hearsay. It is in the record. [461]

Q. I call your attention to Exhibit 26 for identification, which appears to include some bank deposits slips of Wilson, Johnson & Higgins. Will you examine the first amount and date?

Mr. Maxwell: I will stipulate counsel is entitled to read any these exhibits to the jury at any time. No need to keep this witness on the stand.

The Court: That is true. This is cross-examination.

(Testimony of Robert Black.)

A. This deposit slip is dated June 21, 1950 in amount 55 thousand dollars in currency, plus other amounts.

Q. You had examined that in the course of your investigation too, had you not? A. We had.

Q. You testified, Mr. Black, that when you and Mr. Green had Dr. Kelley's patient cards in 1953, you transcribed information only from those cards on which you found a record of payments made in the years 1948 to 1952, is that correct?

A. Only those years, yes sir.

Q. Did you, on various cards, have difficulty in determining the year of payment?

A. Yes, on some cards we had some difficulty.

Q. In other words, you could find the month and date, but the year would be hard to determine, is that right?

A. Yes, that is correct in some cases, but we were able to determine by preceding and subsequent entry.

Q. In all instances you couldn't do that? [462]

A. I believe there were some instances that we couldn't tell that.

Q. Do these cards have both medical and financial information on the same card? A. Yes.

Q. And were many of these cards written in a small hand with closely packed writing?

A. I believe that is correct.

Q. Typical doctor's scribbling?

Mr. Brown: We object to that. He can't testify how a doctor scribbles it. I think that is testimony of Mr. Avakian. I realize he should have wide lati-

(Testimony of Robert Black.)

tude, but the testimony of the witness is saying little and Mr. Avakian is saying a lot.

Q. Mr. Black, the records which you used in trying to identify the income that was reported on returns consisted of what?

A. There was the duplicate slips. Records we used are transcriptions. We also used the receipt books, those that were available. In some cases it was necessary to refer to the records of collection agency to identify the particular basis for payment and in some cases, where we would have a record of income, which was otherwise unidentified, we were able to identify that by the patient himself who signed a check and identified it in that way.

Q. You testified that Dr. Kelley told you that he had a mortgage on his Ford automobile and that you made an inquiry about [463] that?

A. Yes, that is right.

Q. Where did you search for the record of that mortgage?

A. The Ford Agency, Richardson-Lovelock. I assumed at the time he had merely bought the car on credit. We found that that was not the case. I believe we also looked over title mortgages at the court house in Reno.

Q. Where else did you look?

A. That was all, I believe.

Q. Did you look for title mortgages in Carson City? A. No.

Q. Did it occur to you that title mortgages on automobiles might be recorded in Carson City, at

(Testimony of Robert Black.)

the State capitol? A. They might be recorded.

Q. I take it that didn't occur to you?

A. If it was in Reno, it would be recorded there. It could be recorded in Alaska, so far as I was concerned.

Q. You didn't want to make a trip there. Did you check, by any chance, the First National Bank, First & Virginia Branch, in Reno?

A. I believe we asked the bank for all their records pertaining to Dr. Kelley.

Q. Did you ask them if they had any title mortgage at any time on any automobile belonging to Dr. Kelley?

A. Well, I checked the records of the [464] bank. I don't recall going to the bank about Dr. Kelley. That is the usual procedure.

Q. You just overlooked mentioning it when I asked you to state where you had looked, is that it?

A. Yes.

Q. During the course of your investigation of this case, did you ever say to Dr. Kelley: "Doctor, there are some indications here that fees paid to you by these particular patients were not recorded. Can you help us find out whether they were or not, or give us any explanation?"

Mr. Maxwell: Objected to as argumentative.

The Court: Objection sustained.

Q. Did you ever discuss specific patient cards with regard to financial information with Dr. Kelley?

A. We discussed Mr. Green's card.

Q. That is the only one? A. Yes.

(Testimony of Robert Black.)

Q. When was it that you discussed Mr. Green's card?

A. That was the day in the doctor's office, the first time I seen Dr. Kelley, November 6th.

Q. This was after Mr. Green had taken the first batch of patient cards and then you were returning them together? A. That is correct.

Q. He took them alone the first time—at least, you weren't with him?

A. I wasn't with him when he picked them up.

Q. Do you remember what your discussion with the doctor was on Mr. Green's patient card?

A. As I recall, we asked him if all his cards were there and whether or not he destroyed or discarded any, and he told us he destroyed or discarded certain cards that he referred to as "no goods". Then we asked him specifically where Mr. Green's card was, and he replied that, "If it isn't in the file, it must have been misplaced."

Q. Was there any further discussion about Mr. Green's card?

A. I don't recall any about Mr. Green's card.

Q. With regard to these cards he said he discarded, so-called "no goods", isn't it a fact what he told you about this was that from time to time he cleaned out his files by discarding cards on patients whom he was sure would never be coming back again for any reason?

Mr. Maxwell: Objected to as argumentative and an attempt by counsel to testify.

The Court: Objection sustained.

(Testimony of Robert Black.)

Q. Then will you tell us what Dr. Kelley told you?

Mr. Maxwell: Objected to as asked and answered.

The Court: Objection sustained.

Mr. Avakian: I don't believe that was asked on cross-examination. I think that is all, except to cross-examine on Exhibits 127 and 130.

Mr. Maxwell: May I defer re-direct until [466] after counsel has completed?

The Court: I think that will save from duplicating.

(Jury admonished and recess taken at 4:05 P.M.)

Thursday, April 5, 1956.—10:00 A.M.

Defendant present with counsel. Presence of the jury stipulated.

MR. BLACK

resumed the witness stand.

Mr. Maxwell: May it please the Court, before counsel begins his cross-examination, Mr. Black ran some tapes last night, I believe, on documents 127(a) and 130(a) in evidence and I would like to put in the record the correction on the totals at this time, if I may.

The Court: You may reopen for that purpose.

Direct Examination

Q. (By Mr. Maxwell): Mr. Black, you have that information with you?

A. Yes, I made a note of it on the bottom of the exhibits.

(Testimony of Robert Black.)

Q. You had better point those notes on it. You shouldn't make any marks on the exhibit after it goes in evidence. That is 127(a).

A. These are the correct figures at the bottom.

Q. On the last page of each exhibit, is that right?

A. That is right.

Q. And which is dated 4-4-56?

A. That is right. [467]

Q. Can you give me the corrected totals in these various columns?

A. For the year under the stipulations column—

Q. \$1350.00?

A. That is correct. The next column, testimony, total is \$3211.

Q. That is \$50 off.

A. Under the patient card column for that year total \$7580.

Q. All right, continue.

A. And the fees identified column, \$1117 and under the fees not identified column, \$9,472.50. For the year 1950 we did not change any totals on the first column.

Q. Will you give the totals?

A. Under the stipulation column \$1760; under the testimony column, \$5553; patient card column, \$14,940.50; under the fees identified column \$5062; under fees not identified column, \$14,880.50. For the year 1951, under stipulations column, \$2,981.

Q. That is the same figure?

A. I guess that is. Under patient column, \$15,-

(Testimony of Robert Black.)

247.85; under fees identified column, \$5,559.04; fees not identified column, \$13,430.31.

Q. There was no additional figure for that year?

A. There was not, in this exhibit.

Q. All right, 1952 then? [468]

A. First column remains \$16,666.50; testimony column, \$2948; patient card column, \$8102.25, and the fees identified column, \$5693.13 and the fees not identified, \$4552.

Mr. Maxwell: Thank you, Mr. Black.

Cross Examination

Q. (By Mr. Avakian): Mr. Black, do the correction of the errors which you discovered last night result from errors in addition, or were there changes in the figures on the exhibit, or both?

A. Both, there were changes on the page and in addition. I had to have some help with this and I think there were two or three changes on the sheets. Thereafter I didn't make any further changes.

Q. In other words, some one who was helping you actually changed the figures on the exhibits themselves?

A. I believe the figures were added rather than changed.

Q. Can you tell us those items?

A. Mrs. Freda Cooper in 1949, final figure of \$5. That would be in the last column. I don't think that was in there originally. For the same person, 1950, \$13.50, I believe is addition; I don't believe in there originally.

(Testimony of Robert Black.)

Q. In which column, Mr. Black?

A. That is Mrs. Freda Cooper entry, in the patient column and fees not identified column.

Q. Thirteen dollars?

A. Thirteen fifty. For the year 1949, [469] also patient card column and fees not identified column. I have a note here there is also an addition in the identified column for the year 1952. I don't have the name here for that.

Q. What was the amount of that?

A. Ten dollars.

Q. You don't know what patient that was?

A. No, I don't.

Q. These are the only changes that were made on the face of the exhibits themselves, is that right, Mr. Black?

A. That is right.

Q. And these changes are included in the revised totals, is that right?

A. Yes.

Q. Were there other errors found, which were not entered on the exhibits? You said before you discovered it some one was helping you to enter these.

A. I didn't say there were errors. We didn't include all the items on the list. Sometimes items were left off.

Q. In other words, in checking last night you found you rexhibits were incomplete with respect to some small items?

A. Well, we didn't attempt to put in the small items.

Q. Who did this checking of the exhibits and

(Testimony of Robert Black.)

the finding of the correct amounts and correction of your additions?

A. I did some of it myself. Mr. William Beach, who is with the Internal Revenue Service, and Mr. Sam Beardsley. [470]

Q. There were three of you, in other words?

A. Yes.

Q. And then after you had made your examination, these exhibits were then delivered to Mr. Maxwell last night, is that right? A. Yes.

Q. Let me ask you a few general questions regarding these exhibits. You refer to the exhibits and I will refer to the blackboard. Would you tell us the nature of the entries which you entered in the column designated as stipulations?

A. Those were the figures that I took from my notes, the information from stipulates that had been offered.

Q. In other words, as to people to whom it was stipulated if they appeared they would testify to such and such an effect, you made notes of what their testimony would be if called, and those notes were the basis for the amounts entered in the stipulations column, is that right? A. Yes.

Q. What did you enter in the testimony column, what was the nature of the entries?

A. That was notes I took heretofore on the testimony of witnesses, with two exceptions, when I was out of the court for a few minutes and got the information from notes taken by Mr. Calkins and Mr. Green.

(Testimony of Robert Black.)

Q. So that the stipulations column represents people not here [471] personally, as to whom stipulations as to what they would testify have been entered, and the testimony column represents people actually here as witnesses? A. That is right.

Q. What did you enter in the column under the patient card here, pc?

A. That was information that was applicable if the column wasn't intended to be complete. We made an entry in that column only when there was a specific reason for it. "Px" in that column doesn't mean that there is no patient card. When we had some information regarding stipulation or the testimony, there is also some reason for making entry in the patient card column, we did that.

Q. What was the basis on which you decided whether to make an entry in that column or not?

A. In some cases the stipulation also referred to the fact that the doctor's records had the same figures and the doctor's records reflected the same income.

Q. In those instances you entered in the patient card column? A. Generally we did.

Q. That was your intent, at least?

A. That was our intent.

Q. Is that the only type of entry which you made under the patient card column?

A. No, generally the purpose of making entry under the patient [472] card column was when we had no information from witnesses or stipulations. In that case we picked up the amount that was

(Testimony of Robert Black.)

shown on our transcript of the patient cards.

Q. This second category then relates to patients who were neither present as witnesses or covered by stipulation, and in those instances you used your transcript of Dr. Kelley's patient cards to enter the amount in the patient card column, is that right?

A. Yes.

Q. Is your transcript of those things available here? A. Yes.

Q. Do you have it with you?

A. Yes, I do.

Q. Were there any other types of entry you made in the patient card column?

A. I notice here I have in some cases a memorandum entry in brackets which was amount reflected on our patient card transcript, even though we did have testimony of the particular witness.

Q. What was the basis for deciding to include those?

A. It was really a reference for my own use. It has no bearing on the column fees not identified, because in that particular instance we used the testimony of the witness.

Q. Now with respect to witnesses who were covered by either stipulation or testimony column, can you tell us, Mr. Black, [473] whether there are many instances in which your transcript of the patient card shows that the amounts are substantially the same amounts covered by the stipulation or testimony that were on the patient card, but you had not entered that on the exhibit?

(Testimony of Robert Black.)

Mr. Maxwell: Objected to—calls for speculation of the witness, particularly the use of the word “many.” If counsel would state specific instances, that is satisfactory, but to characterize it as “many” instances, we object.

Mr. Avakian: Let me rephrase it.

Q. You testified, where there was either testimony of a witness or stipulation as to testimony, as to amounts paid, if at that time we had not reached a stipulation in court that those amounts were shown on the patient card, that you entered in the patient card column that amount? Did I understand you correctly on that? A. Yes.

Q. Now my question is this—did your transcript of the patient cards indicate that in instances where there was a stipulation or testimony as to the amounts paid, without any stipulation in court as to what the patient card showed, that nevertheless the patient card did show the amount stipulated or testified to?

A. If I understand the question, you would like to know in instances where we picked up the information from the stipulation and testimony and there was no reference to the patient card, you would like to know whether our transcript of the patient [474] cards shows the same amount?

Q. Yes, that is right.

A. That I don't know. It would take quite a bit of time.

Q. What I am trying to get at—is your exhibit

(Testimony of Robert Black.)

intended to imply to the jury that if you had no entry on the patient card——

Mr. Maxwell: Objected to as argumentative. The exhibit speaks for itself.

The Court: Objection sustained.

Q. Does the absence of any entry in the patient card column mean that you found no entry in your transcript of the patient card for that year?

A. It doesn't mean that. We didn't make any attempt to tie in the patient card with these other entries if we were using the other information.

Q. If we may then come down to the other figures—take 1949 as an example, the total that you have for the patient card column is \$7590. Does that represent total amount of fees shown on the patient card, according to your transcript of the patient cards?

A. That figure really does not mean a thing.

Q. Now on this column, would you read the heading on the exhibit here?

A. Fees identified on return.

Q. What do the entries in that column represent?

A. They represent the identified reported income which we were able to locate that applies to that particular patient. [475]

Q. What material did you use in attempting to identify the fees for that particular patient?

A. We used the duplicate deposit slips, transcripts thereof; used the receipt books which were available. We used the collection agency records.

(Testimony of Robert Black.)

Q. Do you have your transcript of the duplicate deposit books with you?

A. Yes, I have it in the car.

Q. Can you tell us the nature of that information?

A. Yes. We transcribed each individual entry from the duplicate deposit slip on to an individual three by five card and filed them in alphabetical order.

Q. Do the duplicate deposit slips give listing of the checks or the clearing house of the check?

A. Yes, they do.

Q. Did the duplicate deposit slips also have writing alongside the check, and name?

A. Generally all of them did.

Q. Was that true always, or are there some instances where there was no name?

A. There were some instances where there was no name.

Q. Were these full names or the last names?

A. Just the last names generally. A few have first name.

Q. Do you know whether those names represented the name of the patient or the name of the person who signed the check? [476]

A. Generally it has the name of the person on it, some person who signed the check.

Q. How do you find that out?

A. Normally there was a reference to that in the doctor's records of patient cards. I think there might have been a few instances in the receipt

(Testimony of Robert Black.)

books, and we also had additional information on that when we circularized the patient.

Q. Did you make any inquiry of the doctor or Mrs. Kelley, directed toward identifying the names on the different deposit slips of any particular patient?

A. No, we didn't particularly ask them about that. We did ask about information on the different cards.

Q. As to particular patients, you mean?

A. No, we asked for patient cards we transcribed to recheck our figures. Since the doctor refused, I didn't want to ask them for information pertaining to particular cards.

(Answer read.)

Mr. Maxwell: That is not the answer.

A. When they refused to give us them, I did not ask for additional information.

Q. Did you state that Dr. and Mrs. Kelley refused to let you see the patient cards?

Mr. Maxwell: That wasn't the question.

The Court: Ask your question. If you can recall, let him answer as he recalls. [477]

Q. My question, I believe, was this, Mr. Black—did you take up with Dr. and Mrs. Kelley any particular names and make any inquiry in an effort to identify the names on the duplicate deposit slips of particular patients?

A. No, we did not ask for the information about any particular patient. We did ask that they re-submit their patient cards, and inasmuch as they

(Testimony of Robert Black.)

refused to resubmit those records, I did not think there was any sense in asking for any information about any particular patient.

Q. When was it that you asked them to resubmit their patient cards?

A. I believe we asked for that information at the time of the conference we had on February 4th. I believe I took it up with you once, possibly twice, since then. As I recall, the answer came not from the doctor himself, but from you.

Q. It was not Dr. Kelley who refused, but the answers came from me, is that right?

Mr. Maxwell: I believe the witness asked Dr. Kelley on February 4th.

The Court: Let the answer speak for itself. I don't want counsel, either one, to testify.

Mr. Maxwell: I don't want to testify. I would like very much to have the witness testify.

Q. Who made the refusal?

A. Whether we actually asked the doctor that question in the [478] conference on February 4th, I am not certain. I believe we did, but I couldn't swear to it.

Q. Did you ask me? A. Yes.

Q. When did you ask me?

A. Well, it was some time between February conference with the doctor and the June conference we had with you. It may have been at the June conference.

Q. You asked me in person or by letter?

A. I believe I wrote you a letter.

(Testimony of Robert Black.)

Q. Did I answer you by letter?

A. Yes, you did.

Q. Do you have that letter?

A. Not with me.

Q. Where is it? A. I think in the files.

Q. In the courtroom or building?

A. It is not in the courtroom. It may be in the building, I am not sure.

Mr. Avakian: Your Honor, simply as the basis for laying the foundation for offering copy of the letter, I would request the production of the original of the letter addressed by me, by air mail on March 4, 1954, to Mr. Robert Black, and if the original is not available, I will ask permission to offer copy in evidence, after showing it to the witness.

Mr. Maxwell: Why don't you let him look at the copy, counsel?

Mr. Avakian: I will be happy to.

The Court: Gentlemen, what is the delay?

Mr. Maxwell: May it please the Court, I have no objection as to the authenticity of those documents. I do have an objection as if at any time they are offered in evidence or used, I will have an objection. As far as the authenticity is concerned, I am very happy to have those used.

Mr. Avakian: May I have these two documents marked as one exhibit for identification, your Honor.

The Court: They will be marked defendant's Exhibit II-1 for identification.

Q. I am showing you Exhibit H-1 for identifica-

(Testimony of Robert Black.)

tion. Directing your attention first to the two-page letter, on top dated February 12, 1954, addressed to me, I ask you whether that is your signature on the second page? A. Yes, it is.

Mr. Maxwell: I will so stipulate, counsel.

Q. And as to the second document, the two pages of yellow paper, which appears to be a carbon copy of letter from me to you, is that copy of letter that you received from me?

Mr. Maxwell: I will so stipulate, counsel.

A. It appears to be a copy of the letter I received.

Q. And when you said you thought you may have written to me to [480] make a request for re-examination of the patient cards, does this refresh your recollection now that your letter of February 12, 1954 to me was the letter in which you made that request? A. That's right.

Mr. Avakian: I will offer these in evidence, your Honor.

Mr. Maxwell: Well now, your Honor, those documents are used to refresh his recollection, not impeaching.

The Court: Do you object to the offer?

Mr. Maxwell: Yes sir.

The Court: Objection sustained.

Mr. Avakian: I wonder if I could be heard on that. The testimony of the witness was that Dr. Kelley refused to permit a re-examination of his patient cards. Then there was the method—he thought the refusal came from counsel, and finally it devel-

(Testimony of Robert Black.)

ops, through his testimony, refusal came from me by letter. I think the letter itself is the best evidence of the refusal and his letter to me is the best evidence of the inquiry. I think it would be highly prejudicial to let his testimony stand without showing the actual communications made in both directions.

The Court: Counsel, testimony has been directed on cross examination and having been refreshed by the letter. It may stand.

Mr. Avakian: Then, your Honor, may I go into the details [481] of the letter through our inquiry and reply, so the full matter may be developed for refreshing his recollection?

The Court: You may through cross examination.

Q. Mr. Black, referring to these documents, to the extent necessary to refresh your recollection, would you state first of all whether, in your letter of February 12, 1954 to me, you made inquiry—

Mr. Maxwell: I will object to what counsel is doing, actually reading copy of the letter not in evidence, and further it would be argumentative, attempt of counsel to testify.

The Court: Well, I don't think counsel, through the back door, can come in over the Court's ruling. Whether this information, this answer is material, I can't say; so pursue on that point.

Mr. Avakian: I will your Honor, and I assure you I am not trying to circumvent the Court's ruling.

A. May I answer the question you asked a while

(Testimony of Robert Black.)

ago. While we were going through these accounts at the February 4th conference with Dr. Kelley, I noted where we definitely did ask him at that time if he would care to submit certain of his records and his answer at that time—your letter also refreshed my memory on that point—was that he didn't want to do that because he had had certain trouble getting his records back in the past.

Q. Isn't it a fact, Mr. Black, that while you and Mr. Green had the patient cards, from October to December 17, 1953, or whatever [482] the exact date was, that during that period Dr. Kelley made a request for an immediate return of his records because of certain action which the Treasury Department had taken against him?

A. He made such a request. At that time Mr. Green was in San Francisco, I don't know whether on a trial or military leave. Then I went away for a few days and the very day I returned I took the records to him.

Q. And that was approximately a week after my request?

A. I think less than a week; a maximum of six days. I think less than a week.

Q. Did I give any explanation to you as to why I did not want to give you the patient cards at that particular time that you made the request of me?

Mr. Maxwell: Object, if your Honor please. The question calls for a yes or no answer.

Q. That is all this question calls for.

(Testimony of Robert Black.)

The Court: The witness may answer.

A. I remember an explanation, as I recall with you from a telephone conversation.

Q. Was the refusal from me an outright refusal, or was it a statement that the request could not be granted at that time for certain reasons?

A. It wasn't an outright refusal.

Q. What was it then? [483]

A. You said—I think there are two conversations here—I think at one time you said that you could not submit the records at that time because you were having them audited by your auditors at the time. If I recall, perhaps later in telephone conversation, you said that you did not want the doctor's records given to us if they were going to be used the subject of the recircularization that might be damaging to the doctor's patients.

Q. Does examination of defendant's Exhibit F-1 for identification, which is my letter of June 14th, refresh your recollection as to whether this last statement you made was by telephone or by letter?

A. Yes, it does.

Q. And how was it?

A. Well, it says here, the question of——

Mr. Maxwell: We object to reading the document.

Q. The question is, was my statement to you made by telephone, as you stated you thought, or was it made by letter?

A. By letter, and I believe it was also by telephone.



